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80-1466

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT C. PECHOUS,

Petitioner,

vs.

JOSEPH G. CATALANO, MYRTLE T. SLAWKO, RAYMOND G. COX, PAUL J. MATULA, EDWARD T. KUCHAN, RICHARD F. TOMAN and FRANK T. CLIFFORD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether public officials, who awarded a private scavenger contract without competitive bids, without advance notice to bidders, and contrary to the bidding schedule previously established, and who approved a spurious declaration of emergency and a $600,000.00 emergency appropriation, and who refused to open the timely bid of one refuse contractor, have proven by "clear and convincing" evidence as required by the First and Fourteenth Amendments, that the speaker, another public official who had knowledge of all of the foregoing, spoke with actual malice:

a) When during a heated public meeting he allegedly stated, "I think 240 pieces of silver changed hands—30 to each alderman."

and

b) When in a reference to the heated public meeting, he allegedly stated to a member of the press,

"Something smells in this contract more than garbage."

"I said at the council meeting when the contract was first awarded that I think 240 pieces of silver changed hands—30 for each alderman. There was just something suspicious about the way that contract was approved."

"I've said all along that if it were ever discovered how that contract was really approved, there'd be some vacant chairs in the city council. There are just too many unanswered questions in the contract. The whole thing was railroaded through, and we can't help but think there was some stronger motivation behind it."?

2.

Does the granting of summary judgment in a defamation suit in favor of public officials and against one who comments on the public actions of these officials violate the commentator's First and Fourteenth Amendment rights where:

a) The Complaint is not verified and each allegation contained therein is denied by the Answer.

b) No proof is offered to establish that the alleged defamatory comments were made nor that they were false.

c) No proof is offered to establish that the alleged comments were made with actual malice.

d) An affidavit is employed to decide genuine issues of material fact which was not offered by the parties to the Motion for Summary Judgment nor was it offered in relation to the Motion for Summary Judgment.

e) The Supreme Court of Illinois makes assumptions unsupported by, and in fact, contradicted by the record?

3.

In regard to the *New York Times* requirement of actual malice, is the freedom of speech of an individual engaged in a "heated debate" concerning a public issue protected by the First and Fourteenth Amendments equally with the freedom of press of a publisher or reporter engaged in the dissemination of "hot news"?

4.

Are the comments of a local public official protected by the First Amendment as "fair comment" where the comments are the honest opinion of the official, and are fairly stated concerning public acts of other local public officials and the facts upon which the official's opinion is based are known to the public and are supplied by the official to the press?

PARTIES TO THE PROCEEDINGS

ROBERT C. PECHOUS
- Circuit Court of Cook County—Defendant
- Illinois Appellate Court—Appellee
- Supreme Court of Illinois—Appellant

MARK FINEMAN

FIELD ENTERPRISES, INC.
- Circuit Court of Cook County—Defendants
- Illinois Appellate Court—Appellees
- Supreme Court of Illinois—Appellees

JOSEPH G. CATALANO

MYRTLE T. SLAWKO

RAYMOND G. COX

PAUL J. MATULA

EDWARD T. KUCHAN

RICHARD F. TOMAN

FRANK T. CLIFFORD
- Circuit Court of Cook County—Plaintiffs
- Illinois Appellate Court—Appellants
- Supreme Court of Illinois—Appellants-Appellees

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IN THE

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Robert C. Pechous, respectfully prays that a writ of certiorari be issued to review the decision of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinions of the Circuit Court of Cook County, Illinois are unreported. (A. 63-66a) The opinion of the Appellate Court of Illinois, First District, is reported at 69 Ill. App. 3d 797, 25 Ill. Dec. 838, 387 N. E. 2d 714 (1979) and the

supplemental opinion upon denial of rehearing is reported at 25 Ill. Dec. 850-852. (A. 40a) The opinion of the Supreme Court of Illinois is reported at ____ Ill. 2d ____, Ill. Dec. ____, ____ N. E. 2d ____ (1980). (A. 1a) The dissenting opinion of one justice of the Supreme Court of Illinois is reported at ____ Ill. 2d ____, ____ Ill. Dec. ____, ____ N. E. 2d ____. (A. 23a)

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 17, 1980. The timely application of Appellant below, Petitioner here, for rehearing was denied on November 26, 1980. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257 (3) and is predicated upon a final judgment entered against Petitioner Pechous by the Supreme Court of Illinois affirming the decision of the Illinois Appellate Court. The Appellate Court had reversed the trial court and summarily entered judgment against Pechous and remanded the case for further proceedings consistent with the announced opinion.

The general requirement of finality, when given a practical construction rather than a technical one[1], has been met in this case. The federal issues involved herein "will survive and will require decision regardless of the outcome" of further state court proceedings on the question of damages.[2] Further, the state court proceedings "could not remotely give rise to a federal question" and will not "render unnecessary a decision of the federal question[s]" presented herein for review.[3]

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[1] *Construction and General Laborers Union* v. *Curry*, 371 U. S. 542, 551, 9 L. Ed. 2d 514, 520, 83 S. Ct. 531 (1963).

[2] *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480, 43 L. Ed. 2d 328, 340, 95 S. Ct. 1029 (1975).

[3] *Radio Station WOW* v. *Maryland*, 326 U. S. 120, 127, 89 L. Ed. 2092, 2099, 65 S. Ct. 1475 (1945).

Therefore, in order "to avoid piecemeal review"[4] of this case the Supreme Court of the United States should note jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 57 of the Illinois Civil Practice Act, Ill. Rev. Stat. (1977), Ch. 110, § 57 provides, in pertinent part, as follows:

> "Summary judgments.
>
> "(1) For plaintiff. Any time after the opposite party has appeared or after the time within which he is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment in his favor for all or any part of the relief sought.

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[4] *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156, 159, 38 L. Ed. 2d 379, 383, 94 S. Ct. 407 (1973). Respondents herein are also petitioning for cert. to review similar federal questions raised here, concerning the press.

"(3) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

STATEMENT OF THE CASE

This defamation action brought by seven former aldermen of the City of Berwyn, Illinois, against the Petitioner, the former City Clerk of the City of Berwyn, arises from two statements allegedly made by the City Clerk concerning the actions of the aldermen in awarding a private scavenger service contract. The first statement was allegedly made at a City Council meeting; the second statement was allegedly made to a member of the press sometime later.

In December, 1975 the officials of the City of Berwyn were considering changing the City's practice of having garbage collected by municipal employees, to employing a private scavenger contractor. The proposal became the subject of a heated controversy among Berwyn City officials and residents. Public surveys were conducted which reflected, as of 12/19/75, that 1,151 people opposed the change and 44 favored it. (R.C319)[5]

Despite public sentiment, on December 19, 1975 the City Council voted to authorize the City Comptroller to advertise for bids from private scavenger services. January 12, 1976 was the date set for the opening of sealed, competitive bids in accordance with state statutes and Berwyn ordinances. (A. 70-73a)

On December 29, 1975 the public works committee met at 7:00 P.M., followed by the regular meeting of the City Council at 8:05 P.M.. At the regular meeting, without prior announcement, the council voted to, and did, open three bids received as of that date. After a recess, the aldermen[6], by a vote of 7 to 0 adopted a hand written motion[7] declaring an emergency and creating an emergency $600,000.00 appropriation. The aldermen then voted 7 to 0 to award a contract to Clearing Disposal Company "without the necessity of advertising for competitive bids."

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[5] References (R. C ____) are to the record; (A. ____) to the Appendix.

[6] Alderman Pechous was not in attendance. Alderman Pechous is not to be confused with his brother, City Clerk Pechous, Petitioner.

[7] The document appears in the Appendix, p. 78a.

City Clerk Pechous became ill and was excused from the December 29th meeting shortly after its commencement. He signed out on the minutes before any discussion concerning the opening of bids or the contract award (R. C134, Par. 1b). The detailed minutes do not note the City Clerk speaking at any time at the meeting. (R. C134-143). It was at this meeting that Petitioner is alleged to have made his first statement—"I think 240 pieces of silver changed hands—30 to each alderman".[8] John Van Tholen spoke at this meeting (R. C244).

At the regular meeting of January 5, 1976 former Mayor Vacin vetoed the Council's actions in awarding the contract, stating in part:

> "You trampled on the rights of all those persons and firms who received bid specifications advertised to be opened on January 12, 1976 . . ."
>
> "The alderman had been primed in advance."
>
> "I will not take part in such devious conduct." (R. C144-146, C147).

The Mayor also vetoed the declaration of emergency and the $600,000.00 appropriation (R. C170-171). He commented that the Council's attempt to put the blame on the city sanitation workers was a "gutless and phony ploy. I cannot be a part to such falsity." (R. C 171).

During the same meeting the City attorney rendered his legal opinion that the Respondents actions of December 29th were illegal.

> 1. The declaration of an emergency was inadequate and your action in declaring an emergency was "illegal."

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[8] The Supreme Court of Illinois Opinion, p. 7, in reliance on the minutes of the 12/29/75 meeting, parenthetically notes that the Petitioner's statement was erroneous because only seven aldermen were present. (Comment—However, the opinion of the court refuses to accept the same minutes which record that Petitioner was ill and excused before the garbage contract was discussed.) (A. 8a).

2. You violated the bidding laws and opened the City to claims by other scavenger firms not included in the private bidding.

3. "Doesn't government have an obligation to its citizens?" (R. C148-150, 297).

The contract for private scavenger service was ultimately set aside by Judge Francis Delaney (R. C96).

At the January 12, 1976 regular meeting the City Council received the timely bid of S.C.A. Service, Inc. another private refuse contractor, in response to the notice to bidders. (R. C308). The minutes of this City Council meeting record that Petitioner *was in attendance* on January 12, 1976 when the sealed bid of S.C.A. Services, Inc. was presented to the Council. Respondent Clifford moved to return and reject the bid without opening it. (R. C 308, par. 9). The City Attorney rendered an opinion that the bid must be publicly opened, read and referred to committee for study. Respondent Cox then moved for a recess. After the recess and during the debate on Clifford's Motion to return the bid, the minutes reflect:

> "AFTER AN EXCHANGE OF VIEWPOINTS BETWEEN THE MAYOR, CITY ATTORNEY, *CITY CLERK* AND COUNCIL MEMBERS* Alderman Clifford made a motion that this communication be accepted and placed on file, that the Council concur in the action as contemplated therein . . ." (R. C308).

The motion carried 8 to 0 (R. C308, par. 9). Thereafter, Alderman Pechous moved to place before the State's Attorney and U. S. Attorney General's offices the circumstances and documents arising from the Council's awarding of the private scavenger contract to Clearing Disposal on December 29, 1975 (R. C309, par. 10).

On several later occasions, Petitioner talked to Mark Fineman, a newspaper reporter for *Suburban Week*, a publication of Field Enterprises, Inc. (R. C 245). Thereafter, Mark

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* Emphasis Supplied.

Fineman wrote an article which was published in the May 12-13, 1976 edition of *Suburban Week*. In that article, Fineman attributes certain statements to Petitioner which are the foundation of the Complaint. The article as published, in part, quoted Pechous as saying:

> "The whole thing was railroaded through . . ." "I think 240 pieces of silver changed hands—30 for each alderman . . . There was just something suspicious about the way the contract was approved." (A. 21-23a).

Respondents, seven city aldermen, filed this defamation suit shortly after the publication of Fineman's article. Petitioner filed a *pro se* answer denying every allegation (R. C 9-10).

The only discovery consisted of Respondents' interrogatories and request for production served on all defendants. These interrogatories did not inquire of Petitioner concerning the alleged December 29th statement. (R. C 243-248).

On October 26, 1976 defendants Fineman and Field moved for summary judgment which motion was granted on the basis of the Illinois innocent construction rule.[9] The trial court further ruled that there existed a question of fact as to whether defendants Fineman and Field published the article in question with actual malice. (A. 63a)

Aware of the trial court's ruling, Petitioner filed a motion for summary judgment supported by his own affidavit on July 18, 1977 before the same trial judge. Petitioner's motion was based upon the innocent construction rule, the privilege of "fair comment" and his affidavit denied the existence of actual malice. (A. 79-81a) Respondents filed a reply and cross motion for summary judgment and offered the affidavit of one

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[9] The Illinois innocent construction rule announced in *John* v. *Tribune Co.*, 24 Ill. 2d 437, 181 N. E. 2d 105 (1962) provides that:

> ". . . the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared non-actionable as a matter of law."

Respondent, Myrtle D. Slawko (R. C336-341). (A. 82a). Petitioner filed a Memorandum in support of his motion and in opposition to Respondents' cross motion, arguing innocent construction, fair criticism under the First Amendment (R. C343-4), the *New York Times* rule (R. 344), state statutes and local ordinances governing bidding procedures, executive privilege,[10] and fair comment (R. C347). (A. 70-77a).

The trial court ruled that the statements were susceptible to innocent construction as a matter of law, and therefore, were nonactionable. The trial court also ruled that executive privilege was inapplicable to the Petitioner. The trial court did not rule on any other legal theory. (A. 65a).

The Appellate Court of Illinois held that Petitioner's statements were not susceptible of innocent construction and that executive privilege did not apply to a ministerial City Clerk. The Appellate Court further found that the statements made a factual charge that respondents had been bribed to award the contract, and therefore, the privilege of fair comment and criticism[11] was inapplicable. *Catalano,* supra, 25 Ill. Dec. 838, 847, 387 N. E. 2d 714, 723 (1st Dist. 1979). (A. 51a).

The Appellate Court further found that Petitioner spoke with actual malice, distinguishing Petitioner's circumstances from that of the press by excluding from consideration all of the documents, and events occurring or dated after December 29th. The Appellate Court reasoned that Petitioner could not rely on these documents and events if he had spoken at the December 29th meeting. *Catalano,* supra, p. 848. (A. 53a).

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[10] Petitioner argued that he was absolutely privileged in speaking as an elected local public official on a matter of local public government. Under Illinois law the privilege has been applied to mayors *Loniello* v. *Fitzgerald,* 42 Ill. App. 2d 900, 356 N. E. 2d 842 (1st Dist, 1976) and to City Commissioners, *Larson* v. *Doner* 32 Ill. App. 2d 471, 178 N. E. 2d 399 (2nd Dist., 1961).

[11] Petitioner, in his Appellees Brief at p. 25 adopted the Argument of Fineman and Field entitled "The Trial Court's Granting of Summary Judgment Must Be Sustained Since Pechous' Statement Is An Opinion And Therefore Not Defamatory". (A 84-86a).

Petitioner had, in fact, relied on these documents and events.[12] In the trial court Respondents never challenged the relevance of these documents. They simply argued that "[n]othing in any document submitted by defendant Pechous pursuant to plaintiffs (sic) interrogatories and request provides any basis for said Defendant's accusation against Plaintiffs." (Plaintiff's Reply and Cross-Motion for Summary Judgment, R. C 339). The same facts and documents which were furnished to Fineman by Petitioner were available and known to Petitioner when he originally spoke on January 12th. Through the trial court, respondents and Petitioner recognized that the same documentation and information was equally relied upon by all defendants. Therefore, in the Appellate Court, Petitioner adopted the arguments and authority proffered by Fineman and Field concerning the Respondents' constitutionally imposed burden of proving actual malice by clear and convincing evidence when defendants spoke and wrote. (A. 84-86a).

Petitioner immediately filed a Petition for Rehearing in the Appellate Court distilling from the record uncontroverted facts: Pechous was not present on December 29th, nor was he recorded as speaking (Petition for Rehearing, p. 3-6). Petitioner's answer denied the statement date. Respondents offered no proof and the record contained no evidence to even suggest Petitioner spoke on December 29th.

Petitioner also argued in Appellate Court on rehearing that the Court had inconsistently applied the principals of *New York*

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[12] Appellee's Brief, Petitioner here, in the Illinois Appellate Court detailed at length the events, vetoes, legal opinions and facts concerning Respondents' actions through January 19, 1976. Appellee's Brief
p. 1-7.

Times and actual malice to Petitioner and the press (A. 89a) and that summary judgment was inappropriate where genuine and material factual disputes exist (A. 87-88a).[13]

In the Supreme Court of Illinois Petitioner argued innocent construction, executive privilege, actual malice,[14] fair comment,[15] and the denial of equal protection of the law under the Fourteenth Amendment because of the unequal application of the First Amendment and actual malice to Petitioner and the press.[16] Petitioner also argued that summary judgment was inappropriate under the established rules of the Supreme Court of Illinois where genuine and material factual issues were raised by the pleadings.[17] (A. 90-98a).

The Supreme Court of Illinois held that the statements could not be innocently construed and that a City Clerk is not entitled to executive privilege. It further held that Petitioner's statement as made at the council meeting and to Fineman was a factual statement charging bribery and was not a constitutionally protected expression of opinion. Opinion, p. 8-12. (A. 9-14a). The Supreme Court of Illinois did not rule on the asserted 14th Amendment equal protection infringements.

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[13] The Appellate Court on 1/18/79 ordered all parties to file memoranda. Petitioner cited authority of the same Appellate Court as to how the factual questions could be fairly resolved. In *Ashland Savings & Loan Assn.* v. *Aetna Ins. Co.*, 18 Ill App. 3d 70 309 N.E. 2d 293, 300 (1st Dist. 1974) the court noted that the belated recognition of factual issues raised by the pleadings precluded entry of summary judgment and remanded the cause in the interests of justice. The Appellate Court refused to remand this cause and invoked nonjurisdictional waiver principles. *Catalano, supra,* 25 Ill. Dec. 838, 851 (A. 61a).

[14] Petition for Leave to Appeal, p. 4, 6, 7, 8-13; Supplemental Brief p. 13; Reply Brief p. 1-11. Revised Petition for Rehearing p. 28.

[15] Petition for Leave to Appeal p. 9, 10, 12 and 16; Reply Brief p. 13, 15.

[16] Petition for Leave to Appeal p. 4-5; Supplemental Brief p. 11; Revised Petition for Rehearing p. 22-28.

[17] Supplemental Brief p. 14; Revised Petition for Rehearing p. 12-21.

Finally, the Supreme Court of Illinois refused to follow its own well established principles governing the entry of summary judgment and entered summary judgment for Respondents. (Justice Clark, dissenting A. 27-28a). The court expressly found that Petitioner uttered his statement with a reckless disregard for its truth or falsity. Opinion, p. 14. (A. 15-17a).

Petitioner sought rehearing in the Illinois Supreme Court to no avail. (A. 97-98a).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE.

A. The First Amendment Freedom of Speech and Public Officials.

This Court has steadfastly guarded the First Amendment freedom of speech in the public sector, protecting the critics of public officials in the performance of their public actions. This case imposes liability upon just such a critic. This Court quoted with approval the 1798 Virginia Resolutions which declared that the exercise of the power to restrain freedom of speech in this area "*ought to produce universal alarm,** because it is leveled against the right of freely examining public characters and public measures." *New York Times* v. *Sullivan* 376 U. S. 254, 274, 11 L. Ed 2d 686, 703, 84 S. Ct. 710 (1964). These cases, closely paralleling prosecutions under the Sedition Act, and history dictate that "extreme caution [be exercised] in imposing liability." *Curtis Publishing Co.* v. *Butts* 388 U. S. 130, 153, 18 L. Ed. 2d 1094, 1110, 87 S. Ct. 1975 (1967).

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* Emphasis Supplied.

On review of a state court judgment in these cases, the U. S. Supreme Court itself must make an independent examination of the whole record so as to assure itself that the judgment below does not constitute a forbidden intrusion on the field of free expression. *New York Times* v. *Sullivan,* supra, 376 U. S. 254, 285, 11 L. Ed. 2d 686, 709. In this case the record will reveal a "constitutionally insufficient" basis to support a summary judgment. The "public stake" in the public business and the conduct of public officials is so great that this cause must be re-examined. *St. Amant* v. *Thompson,* 390 U. S. 727, 731-2, 20 L. Ed. 2d 262, 267 88 S. Ct. 1323 (1968).

B. The Ad Damnum of $2,000,000.00.

The ambitious ad damnum in this case magnifies the words of this Court proportionately: "The fear of damage awards . . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *New York Times* v. *Sullivan,* supra, 376 U. S. 254, 277, 11 L. Ed. 2d 686, 705.

C. Has the Growth and Institutional Power of the Media Nurtured the Freedom of Press into a Greater Freedom than the Individual's Right to Freedom of Speech?

This case has legitimately raised the question. Petitioner and Respondents have argued through the Illinois Appellate Courts that the actions of the press in this case have more nearly approached the "egregious" standard of conduct required to prove actual malice than have the actions of Petitioners. These pleas for equality as between the freedoms of speech and press under the First Amendment have fallen on deaf ears.

Justice Clark, dissenting from the Supreme Court of Illinois' opinion in this cause, struck the heart of this case when he pointedly stated:

> "As to defendants Fineman and Field, on this record I find their conduct more culpable than Pechous'. Dissent p. 29 (A. 33a).

"Thus, the majority appropriately discussed the notes submitted by the reporter in the course of his investigation which state: 'strongly feel $ has changed hands instinctive feeling.' And the majority implies that the result reached here would be reversed 'had it been shown, by way of depositions, answers to interrogatories, admissions, or affidavits, that Pechous had told Fineman that his charge of bribery was prompted by 'instinct' alone and that he had no evidence to support it.' Slip op. at 17. Dissent p. 30 (A. 34a).

"The reporter had plenty of time to compose his story and a perspective of several months which was unavailable to participants at the January meeting, like Pechous and members of the audience who, according to one of the aldermen, yelled 'payoff' as the contract was voted upon. He had Pechous' information and had obtained the exculpatory explanations of the aldermen. He made an investigation and found no evidence cash payoffs had been made. *He then transformed Pechous' statement into the hard factual charge of payoffs.** Moreover, he could have written the article without quoting Pechous' '30 pieces of silver' statement. The gist of the controversy could have been repeated without it. In my view, therefore, the evidence does not justify holding Pechous liable while exonerating defendants Fineman and Field." Dissent p. 31 (A. 35-36a).

The reporter and the press for the good of the story withheld information supplied by Petitioner and added "facts" not supplied by Petitioner which transformed Petitioner's statement and its meaning.

Fineman and Field knew prior to publishing, but withheld:

1. The fact that only seven aldermen were present and voted to award the contract. This misleading omission made "mathematical sense" out of the epithet that "240 pieces of silver changed hands": (8 aldermen × 30 pieces = 240 pieces) whereas (7 aldermen × 30 pieces = 210 pieces).

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* Emphasis Supplied.

2. The fact that Alderman Pechous is the Petitioner's brother. No reasonable reader, if presented the unabridged facts, would conclude that the Petitioner was charging his brother with bribery.

3. The fact that, according to Fineman's notes, the Petitioner only had an "instinctive feeling" that money changed hands.

4. The fact that Petitioner was the newspaper's source of the information that Mr. Van Tholen, "a close political ally of the aldermen," was hired by the parent company of the recipient of the refuse contract shortly after the awarding of the contract. (This information would have given the reader an understanding of Petitioner's "stronger motivation" comments and an understanding that Petitioner was not asserting "pay-off").

Fineman and Field added "facts" to their story that were not supplied by Petitioner:

1. Fineman injected the word "payoff".

2. Fineman claimed an "inside industrial source", who was never revealed.

3. Fineman also added to his article "*one industry source* claimed the Groot firm's bid . . . was never intended to be competitive against Clearing. . . ."

This Court has expressly approved a rule which enhances freedom of the press, specifically the "hot news" rule. As announced in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 157, 18 L. Ed. 2d 1094, 1112, 87 S. Ct. 1975 (1967) this rule affords the press protection from actual malice even though there may be a lack of investigation into the truth or falsity of the publication. No similar rule has been expressly approved by this Court for a speaker embroiled in a "heated debate" although he is likewise without adequate opportunity to investigate the truth or falsity of the facts upon which he bases his

opinion. In this case Petitioner stated his opinion in the heat of debate. Accordingly, the Illinois Appellate Courts should have afforded this circumstance some consideration, as it affected the issue of actual malice. This Court should expressly approve the Restatement of Torts (Second), as follows:

> "Words uttered face to face during an altercation may well be understood merely as abuse or insult, while words written after time for thought and published in a newspaper may be taken to express the defamatory charge and to be intended to be taken seriously." Restatement of Torts (Second), § 566, Coment d. (1977).
>
> "Also the lack of 'availability of sufficient time and opportunity to investigate the truth of the statement . . .' is another factor in judging the speaker's subjective frame of mind." Restatement of Torts (Second), § 580A, Comment d. (1977).

While in *Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U. S. 6, 14, 26 L. Ed. 2d 15, 90 S. Ct. 1537, 1542 (1970), this Court has distinguished the "vigorous epithet" from a defamatory statement of fact, both Illinois Appellate Courts have refused to consider, or discuss this distinction as it relates to the speaker's "subjective state of mind" and actual malice. *Tunnell* v. *Edwardsville Intelligencer, Inc.,* 43 Ill. 2d 239, 247, 252 N. E. 2d 538, 542, (1969).

D. Fair Comment: Opinion or Statement of Fact?

The privilege of fair comment is an expression of opinion fairly stated regarding a matter of public concern. Restatement of Torts (Second), § 566 (1977). In regard to this privilege Justice Clark noted:

> "The fair-comment privilege has been recognized by the United States Supreme Court (see *New York Times Co.* v. *Sullivan* (1964), 376 U. S. 254, 292 n. 30, 11 L. Ed. 2d 696, 713 n. 30, 84 S. Ct. 710, 732 n. 30) although the extent of the privilege has never been defined." Dissent, p. 31

> "Since the persons allegedly defamed here were public officials and since the comments made concerned a matter of public significance, we would not in this case have to decide the extent of protection afforded to opinions concerning private individuals or private matters. See *Pfister* v. *Milwaukee Free Press Co.* (1909), 139 Wis. 627, 640, 121 N. W. 938, 944; Hill, *Defamation and Privacy Under the First Amendment,* 76 Colum. L. Rev. 1205, 1229 N. 113 (1976)." Dissent, p. 32 (A. 36a).

The alleged statements of Petitioner represent his opinion concerning the actions of the Respondents.

> "Pechous' remarks were suspicious inferences, stated and understood as such, and based upon public information." Dissent, p. 32 (A. 37a).

As this Court has observed:

> "Under the First Amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *Gertz* v. *Robert Welch, Inc.* 418 U. S. 323, 339-340, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974). See also *Porcella* v. *Time, Inc.* 300 F. 2d 162 (7th Cir. 1962) and *Old Dominion Branch No. 496* v. *Austin* 418 U. S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974)."

This principle has been followed by the lower federal courts, stating in *Buckley* v. *Littell,* 539 F. 2d 882, 893 (2d Cir. 1977):

> "The distinction [is made] . . . between 'false statements of fact' which receive no constitutional protection, and 'ideas' and 'opinions' which by definition can never be 'false' so as to constitute false statements which are unprotected when made with actual malice."

Petitioner's alleged comments constitute a non-actionable expression of opinion that the respondents acted as if they were motivated by interests other than the best interest of the City of Berwyn. Why the aldermen voted and acted as they did, has never been discovered, though political motivation has been suspected.

As Justice Clark, recognizing the importance of the right to comment, noted:

> "Inferential comments concerning political issues and public figures can have great value to the political process. An evaluation of known or available facts may spark the production of additional information through the investigatory actions of others and additional discussion by those seeking to implement a particular program. Pechous' comments in this case did spark such activity. Dissent, p. 33 (A. 38a).

The Petitioner is alleged to have made his first comment at a City Council Meeting. All of the facts known to the Petitioner were also known by those in attendance at the meeting.

> "I do not think . . . that the audience believed Pechous had more information than it did. The members of the public who heard or read Pechous' remarks were fully able to make up their own minds on the issue, and they could conclude either that Pechous had defamed himself by making an unwarranted inference or that his suspicions reflected and represented their own views." Dissent, p. 32 (A. 37a).

Thus, the opinion of the Petitioner was fairly stated; his opinion was based on facts either known to the audience or stated by the Petitioner when expressing his opinion. Restatement of Torts (Second), § 566 (1977).

> "In this case, moreover, the defendants were public officials. Public officials generally have access to the media (*Troman* v. *Wood* (1976) 62 Ill. 2d 184, 193); hence not only is the factual predicate known, permitting the public to reach its own conclusions (about the speaker as well as the plaintiffs), but it is likely that the competing inferences will be heard. Here, the media reported in the same article the countercharges of the aldermen, to wit, that Pechous' statements were motivated by political ambition and partisanship, and their defense of the merits of the private-scavenger-service contract. This access to the marketplace of ideas distinguishes this situation from those in which an

> authoritative pronouncement that a particular statement was false (*Troman* v. *Wood* (1976), 62 Ill. 2d 184, 195) is desirable." Dissent, p. 33 (A. 38a).

The Petitioner is also alleged to have subsequently made similar comments to a newspaper reporter. Again, Petitioner was unable to supply a statement of fact as he had only his opinion to offer. Just as Petitioner couched his thoughts in words of opinion at the City Council meeting, he is alleged to have expressed to the reporter: "I think . . .". To the reporter he also is alleged to have said: "We can't help but *think* . . .". One generally does not make a statement of fact by prefacing the statement with "I think". In common parlance, these two words usually denote an *opinion.*

The Petitioner, when expressing his opinion, advised the reporter of the factual occurrences upon which he based his opinion. By doing so, the Petitioner once again satisfied the requirement of commenting fairly. Restatement of Torts (Second), § 566 (1977).

Both of the Petitioner's alleged comments were clearly stated as an opinion, concerned the public actions of local politicians and satisfied the requirement of being fairly stated. Thus, the alleged comments of the Petitioner are privileged under the doctrine of fair comment. Justice Clark concluded:

> "In sum, then, I am persuaded that the fair-comment privilege, a privilege with ancient roots in this State (see *Hahnemannian Life Insurance Co.* v. *Beebe* (1868), 48 Ill. 87), and which represents the trend of the constitutional common law of defamation, is applicable here." Dissent, p. 33 (A. 39a).

Yet, the majority has simply dismissed the application of this doctrine to the case-at-hand, stating that the alleged comments are not opinions but rather, are statements of fact. Seemingly, the Supreme Court of Illinois impeaches its own opinion, finding that the alleged comments are not literal statements of fact but are *figurative* statements of fact. This decision has certainly put individuals who would care to

comment on public issues in quite a precarious position. They must choose their words with the wisdom of Solomon.[18]

The majority, finding that the comments of Petitioner are distinguishable from the privileged comments in *Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U. S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970), stated:

> "There is a crucial difference between *Greenbelt* and the present case: In *Greenbelt* the word 'blackmail' was used to convey the speaker's negative evaluation of conduct by the plaintiff which was known to both the speaker and his audience. In the case before us Pechous' charge of bribery, while of course it evidences his disapproval of the award of the contract, also informs his audience that a criminal act of which the audience was unaware has been committed by the aldermen." Opinion p. 11 (A. 13a).

It is respectfully submitted that Petitioner's use of a figurative phrase instead of a single word, both the phrase "240 pieces of silver" and the word "blackmail" being used as "vigorous epithets", did not detail or inform the audience of anything more than they already were aware. If Petitioner had used one word "Judas", as his figurative epithet, who would claim that his opinion disclosed facts concerning some criminal activity of which his audience was unaware?[19]

The Illinois Appellate Courts decided that Petitioner's comments are statements of fact thus making all other considerations regarding fair comment immaterial. The Court fails,

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[18] This conclusion is further verified by the lower court's refusal to follow, or even comment upon, *Lundstrom* v. *Winnebago,* 27 Ill. App. 2d 128, 169 N.E. 2d 369 (1960) where liability was not imposed on strikingly similar facts.

[19] In the Illinois Appellate Court Petitioner argued that the use of "et tu Brute" would not have disclosed a secret stabbing. In the Supreme Court of Illinois Petitioner argued that the use of "Something's rotten in Denmark" would not have disclosed a secret crime unknown to his audience.

however, to provide a convincing explanation of why the Petitioner's comments are statements of fact and not opinion. The use of the phrase "I think", and the figurative nature of the utterance do not support the court's conclusion.

Finally, the lower Court erred in granting Respondents' motion for summary judgment by deciding the issue of whether Petitioner's statement was the assertion of a fact or the expression of an opinion. While respondents offered no evidence that Petitioner's comments were factual, Petitioner did offer evidence that it was an expression of opinion. Petitioner's *uncontradicted testimony* by sworn affidavit explained *that it was his "opinion"* that he sought to convey to the public.[20] (A. 81a).

Furthermore, in *Perlman* v. *Time, Inc.*, 20 Ill. Dec. 831, 837 (1st Dist., 1978), the Appellate Court reversed the entry of summary judgment for defendants. The Appellate Court determined that whether words are the statement of opinion or fact is a genuine issue of material fact. It is well settled law in Illinois that summary judgment may not be entered where there is in dispute a genuine issue of material fact. Ch. 110, Ill. Rev. Stat. (1977) § 57(3); *Carruthers* v. *B. C. Christopher & Company,* 57 Ill. 2d 376, 313 N. E. 2d 457 (1974).

The foregoing is illustrative of the contorted abuse of procedure and perversion of facts that have resulted in the rejection of the privilege of fair comment.

Cases such as this disclose that it is as important today as it was when the "Bill of Rights" was ratified that this court stand ready to protect the right of each individual to express his honest opinion on matters of state.

> "I shall not argue to you whether the defendants' ideas are right or wrong. I am not bound to believe them right in order to take their case, and you are not bound to

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[20] Under Illinois law Respondents by not contradicting the affidavit are bound by it. *Fooden* v. *Board of Governors of State Col. & Univ.*, 48 Ill. 2d 580, 272 N. E. 2d 497, 500 (1971).

believe them right in order to find them not guilty. I don't know whether they are right or wrong and you don't know whether they are right or wrong. But I do know this—I know that the humblest and the meanest man who lives, I know that the idlest and the silliest man who lives, should have his say. I know he ought to speak his mind. And I know that the Constitution is a delusion and a snare if the weakest and the humblest man in the land cannot be defended in his right to speak and his right to think as much as the greatest and the strongest in the land. I am not here to defend their opinions. I am here to defend their right to express their opinions."

Attorney for the Damned, Arthur Weinberg, Ed. (1957) quoting closing argument of defense attorney, Clarence Darrow in "The Communist Trial"; Chicago, Illinois (1920), p. 127-128.

II.

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS CONFLICTS WITH THE DECISIONS OF THIS COURT

A. The Lower Court Dispenses with the Respondents' Burden of Proving the Falsity of the Utterance.

The Illinois Supreme Court in this case stated:

"*New York Times Co.* v. *Sullivan* (1964), 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, holds that recovery for a defamatory statement concerning a public official may be allowed only if it is established both that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. (*Garrison* v. *Louisiana* (1964), 379 U. S. 64, 74, 13 L. Ed. 2d 125, 132, 85 S. Ct. 209, 215; Restatement of Torts (Second), sec. 581A (1977).) A determination that the defendant made his statement with actual malice does not establish that the statement was in fact false. Restatement of Torts (Second), sec. 581A, comment f.

> "The parties do not discuss the question of truth or falsity in their briefs, and it is apparent that by moving for summary judgments they elected to dispense with the necessity of resolving that question." Opinion, p. 5-6 (A. 7a).

This analysis discards one essential element and overlooks the further requirement of *New York Times* v. *Sullivan,* supra, 376 U. S. 254, 285-6, 11 L. Ed. 2d 686, 710 which requires proof of falsity by "clear and convincing" evidence. This requirement has not been relaxed since the decision in *N. Y. Times:*

> Public officials like public figures "may recover for injury to reputation only on clear and convincing proof that the defamatory *falsehood** was made with . . . reckless disregard for truth." *Gertz* v. *Welch,* 418 U. S. 323, 342, 41 L. Ed. 2d 789, 807 (1974).

The burden was on the public officials to prove falsity, not upon the Petitioner to prove truth. The Petitioner herein denied every allegation of Respondents' complaint, including that the alleged statements were even made, yet the Illinois Appellate Courts found the Petitioner liable in defamation for his alleged statements.

B. Respondents Have Failed to Prove Actual Malice.

Petitioner offered his affidavit which stated that the actions of the aldermen in summarily discharging thirty city employees in favor of a private scavenger were "unorthodox and precipitous." In addition, the affidavit denied that he spoke with actual malice. Respondents have not contradicted Petitioner's affidavit. (A. 81a).

In *Carruthers* v. *B. C. Christopher & Co.,* 57 Ill. 2d 376, 313 N. E. 2d 457 (1974), the Court considered the effect of an uncontradicted affidavit, and followed the rule as stated in

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* Emphasis Supplied.

Fooden v. *Board of Governors of State Col. & Univ.,* 48 Ill. 2d

580, 272 N. E. 2d 497,500 (1971). The Court stated that "... an affidavit in support of a motion for summary judgment is actually a substitute for testimony ... and where such well alleged facts are not contradicted by counter-affidavit, they *must* be taken as true ..." (Emphasis supplied) The sufficiency of Petitioner's affidavit has not been attacked by Respondents at any time and "cannot be tested for the first time on appeal," *Fooden,* at p. 501.

Petitioner's affidavit offered in support of his motion for summary judgment was also offered in opposition to the Respondents' motion since the parties filed cross motions for summary judgment. *Allen* v. *Meyer,* 14 Ill. 2d 284, 152 N. E. 2d 576, 580 (1958). As an affidavit offered in opposition to Respondents' motion for summary judgment, Petitioner's affidavit must be liberally construed. "In determining whether a genuine issue as to any material fact exists, the Court must construe the pleadings, depositions and affidavits most strictly against movant and most liberally in the favor of the opponent." *Kolakowski* v. *Voris,* 32 Ill. Dec. 59, 62, 76 Ill. App. 3d 453 (1st Dist. 1979). Also see *Littrell* v. *Coats Co., Inc.,* 19 Ill. Dec. 629, 632, 62 Ill. App. 3d 516, 379 (2nd Dist. 1978).

This Court has recently cautioned that "proof of 'actual malice' calls a defendant's state of mind into question (citation) and does not readily lend itself to summary disposition." *Hutchinson* v. *Proxmire,* 443 U. S. 111, 120 n. 9, 61 L. Ed 2d 411, 422 n. 9, 99 S. Ct. 2675 (1979); *Wolston* v. *Readers Digest Association, Inc.,* 443 U. S. 157, 161 n. 3, 61 L. Ed 2d 450, 456 n. 3, 99 S. Ct. 2701 (1979).

In *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473, 7 L. Ed 2d 458, 464, 82 S. Ct. 486 (1962), this Court declared that "trial by affidavit" is no substitute for trial by jury, particularly where "motive and intent" play leading roles.

The result reached in the case-at-hand demonstrates the wisdom of that admonition.[21]

Justice Clark discussed the results reached by the Supreme Court of Illinois in the case-at-hand, as follows:

> "... In this case, the plaintiffs have been granted summary judgment against Pechous on the basis of a statement alleged in an unverified complaint to have been made on December 29, without supporting that allegation with a single evidentiary fact, i.e., without supplying an evidentiary fact which would entitle them to a judgment as a matter of law. The plaintiffs have relied upon their unverified complaint to do more than raise an issue of material fact; they have won a judgment on that basis. Therefore, the validity of *Carruthers* is open to question." Dissent, p. 24 (A. 28a).

The First and Fourteenth Amendments will not permit freedom of speech to be slighted so easily.

In *Guthrie* v. *Annabel,* 8 Ill. Dec. 905, 907, 50 Ill. App. 3d 969, 365 N. E. 2d 1367 (2nd Dist., 1977), a libel action was decided for the defendant after a bench trial. The defendant testified that his *motive* in publishing the letter was the dissemination of information to the public about the activities of a man who was a candidate for public office. Similarly, Petitioner's uncontroverted affidavit explained his *motive* in publishing:

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[21] A trial in the PECHOUS case would better enable the trial court to draw reasonable inferences and conclusions. The Appellate Courts of Illinois should review the reasonableness of the inferences and conclusions drawn by the trial court, but they should not initially draw those inferences and conclusions. To do so unwisely embroils the Appellate Courts in trial by documents without the aid of seeing the witnesses and judging their credibility and eliminates a step from the appeal process, a step in the structure of our court system which protects all litigants. Petitioner's Revised Petition for Rehearing in Illinois Supreme Court, p. 18.

> "4. The electors and taxpayers had a right to know affiant's opinion of the conduct of the aldermen and the political ramifications thereof." (A. 81a).

The Court went on to state that

> "it was for the trier of fact to determine whether there existed clear and convincing evidence of 'actual malice' on the part of defendant." *Guthrie* v. *Annabel,* 8 Ill. Dec. 905, 908 (2nd Dist., 1977).

Professor Douglas Laycock agreed that "questions of motive, intent or subjective feelings are rarely appropriate for summary judgment." 9 Loy. Chi L. Rev. 823, 849 (1978).

The Supreme Court of Illinois made the following observations concerning the degree of Petitioner's knowledge:

> "From the answers to interrogatories, which operate as admissions (73 Ill. 2d Rules 212(a)(2), 213(f), we must conclude that Pechous had no personal knowledge of the alleged act of bribery, that he had not been informed of it by another person, and that he had no documentary evidence of it. We must also conclude that Pechous did not attempt to verify his statement by an inquiry directed to any of the aldermen or to persons associated with Clearing." Opinion, p. 13 (A. 15-16a).

This Court analyzed the same observations in *St. Amant* v. *Thompson,* 390 U. S. 727, 730, 20 L. Ed. 2d 262, 266, 88 S. Ct. 1323 (1968):

> "Purporting to apply the New York Times malice standard, the Louisiana Supreme Court ruled that St. Amant had broadcast false information about Thompson recklessly, though not knowingly. Several reasons were given for this conclusion. St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; . . ."

Each of these facts was rejected as a basis upon which to impose liability in *St. Amant.* This Petitioner, however, did not rely upon any informant as did *St. Amant.*

However, this reliable informant criterion must be weighed against the certainty or uncertainty of the language used to defame. In other words, the more figurative the language, the less precise the words of charge, the more near fair comment and the more opinion-like the assertion, the less weight the absence of a reliable informant should bear. Moreover, it should be noted that *St. Amant* was not engaged in the heat of debate as was your Petitioner. As Justice Black and Justice Douglas noted, in dissent: "Petitioner's casual, careless, callous use of the libel cannot be rationalized as resulting from the heat of a campaign." *St. Amant,* supra, 390 U. S. 727, 734, 20 L. Ed. 2d 262, 269.

C. Abridging the First Amendment Freedom of Speech, The Lower Court Has Made Assumptions Contradicted By The Record and Has Employed An Affidavit Not Offered Against Petitioner In An Effort To Supply The Facts and the Proof Not Provided By Respondents.

The Supreme Court of Illinois identified the following issues of fact to be decided.

> "The pleadings left unresolved several issues of fact: whether Pechous, at the meeting of December 29, had made the statement alleged in paragraph 1 of the complaint; whether he had made the statement to Fineman alleged in paragraph 2; whether these statements were false; and whether Pechous had made them with knowledge of their falsity or with reckless disregard of their truth or falsity. The propriety disposing of the action upon summary judgment thus turned on whether the additional information before the court eliminated all genuine issues of material fact, as all of the parties represented in their motions." Opinion, p. 3-4 (A. 4a).

In an effort to put these factual issues aside, the Supreme Court of Illinois made three assumptions, each one adverse to Petitioner.

> 1. "... [I]n his answer Pechous denied having made the alleged statement regarding 240 pieces of silver at the December 29, council meeting. The complaint was not verified, and the plaintiffs filed no affidavit attesting to the truth of the allegation. It should be added that the minutes of the meeting recite that Pechous was excused on account of illness shortly after the meeting began and before the matter of the bids on the garbage collection contract had been reached. *That circumstance does not of course rule out the possibility that Pechous may have remained in council chambers and made his quoted remark during the balance of the meeting."* * Opinion, p. 4-5 (A. 5a).
>
> 2. "... [W]e focus, as do the parties, upon his remark, 'Two hundred forty pieces of silver changed hands—thirty for each alderman.' (*We note in passing that Pechous' statement is erroneous in assuming that all eight aldermen voted to award the contract to Clearing.** The minutes disclose that only seven aldermen attended the meeting of December 29, the same seven individuals who are the plaintiffs here.)" Opinion, p. 7 (A. 8a).
>
> 3. "Finally there was an affidavit by Pechous attached to his motion for summary judgment which stated: '[A]ffiant did not act with malice in making the comments he did because his own brother was one of the aldermen being critized by affiant.' (The minutes of the December 29, 1975, meeting recite that Alderman Pechous, the defendant's brother, was not present.)" Opinion, p. 13 (A. 16a).

The Court relied on the unsworn Minutes attached to Petitioner's Answers to Interrogatories to determine that Petitioner's statement was *erroneous* and to impeach Petitioner's uncontroverted affidavit. However, the Court is unwilling to accept the minutes of the December 29th meeting that show

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* Emphasis Supplied.

Petitioner ill and excused as evidence that Petitioner did not speak at the December 29th meeting. It was at this meeting Petitioner is alleged to have made his initial City Council utterance. To the prejudice of Petitioner and to the exasperating frustration of the First Amendment, the Court applies waiver and estoppel to exclude documents initially relied on by Petitioner in the trial court.

Justice Clark, dissenting, notes the unfairness of this action.

"Waiver and estoppel, moreover, are double-edged swords. Plaintiffs admitted in the trial court that Pechous' statements could be considered with reference to the documents he submitted in response to plaintiffs' interrogatories. Many of these documents existed only after the December 29 meeting, and plaintiffs never challenged their relevance in the court on this basis. Generally issues not presented to the trial court cannot be presented for the first time on appeal. (citations.) Had the plaintiffs in the trial court relied upon an allegation that Pechous had no knowledge of the circumstances indicated in the messages of the mayor and city attorney, Pechous would then have had an opportunity to contravene that argument in the trial court, by denying the allegation, by submitting additional evidence, or by pointing out the evidence which was properly in the record and which indicated that he could not have made his statement on December 29. The plaintiffs have illegitimately prejudiced Pechous by waiting until the case was on appeal to argue that the documents Pechous submitted in response to interrogatories were irrelevant to the statement alleged in the first paragraph of the complaint. We should not selectively apply the doctrines of waiver and estoppel; the case should remain as the parties shaped it in the trial court.

"Thus, Pechous did not *erroneously* assume that "all eight aldermen voted to award the contract * * *" or *mistakenly* say that his brother was a subject of his critical remarks. He correctly assumed all eight aldermen voted to award the contract and correctly included his brother as a subject of his remarks, because they were made at a meeting when his brother was present." Dissent, p. 24-25 (A. 28-29a).

Lastly, the Supreme Court of Illinois has employed the affidavit of another defendant on Respondents behalf when that affidavit was never offered by anyone against Petitioner. (Opinion, p. 5). (A. 6a). This procedure is contrary to the Illinois Civil Practice Act, Ill. Rev. Stat., (1977) ch. 110, § 57(3), and abridges the freedom of speech in the public sector. The First and Fourteenth Amendments will not permit the enforcement of "any law (procedural or substantive, as written or as applied) which shall abridge the privileges and immunities of citizens of the United States". U. S. Constitution, 14th Amendment.

CONCLUSION

The constitutional principles upon which this country was founded are of exceptional importance warranting the attention of this Court. The First Amendment Freedom of Speech as written by our forefathers, as conceptualized by Norman Rockwell, "Freedom of Speech," 1943, and as exercised by Petitioner require that this writ of certiorari be granted and that this cause be reviewed.

Respectfully presented,

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APPENDIX A

Docket Nos. 51912, 51931—Agenda 26—November 1979.
JOSEPH G. CATALANO *et al.*, Appellants, v. ROBERT C. PECHOUS *et al.*, Appellees.

MR. JUSTICE WARD delivered the opinion of the court:

The plaintiffs, who are seven of the eight aldermen that comprise the city council of Berwyn, filed a complaint in the circuit court of Cook County against the defendants, Robert C. Pechous, the city clerk, Mark Fineman, a reporter for Suburban Week, a weekly supplement to the Chicago Sun-Times, and Field Enterprises, Inc. (Field), the publisher of the Sun-Times. The action sought damages for a defamatory statement allegedly made by Pechous at a council meeting and repeated several months later to Fineman, who quoted it in an article which appeared in Suburban Week.

Motions for summary judgment were filed by Pechous and by Fineman and Field. In each case the plaintiffs filed a reply and a cross-motion for summary judgment. The trial court granted the defendants' motions and denied those of the plaintiffs. On appeal the Appellate Court for the First District reversed the circuit court's granting of Pechous' motion for summary judgment and its denial of the plaintiffs' motion for summary judgment and affirmed the award of summary judgment in favor of Fineman and Field (69 Ill. App. 3d 797). We granted petitions for leave to appeal filed by the plaintiffs and by Pechous. 73 Ill. 2d R. 315.

This litigation had its origin in a decision by the city council of Berwyn to abandon its practice of having garbage collected by municipal employees and to contract for its collection by private scavenger concerns. The city authorized the solicitation of bids and later awarded a contract to one of the bidders. The particulars, documented by materials which were before the circuit court on the motions for summary judgment, are set out in the opinion of the appellate court, and no more than a summary is required here.

At a meeting on December 19, 1975, the council voted to authorize the city comptroller to draw up specifications and advertise for bids for private scavenger service for the year 1976. Although no copy of the invitation to bid appears in the record, a letter of January 5, 1976, from the mayor to the council states that the invitations specified January 12 as the deadline for the submission of bids. The minutes of the December 19 meeting report that Pechous, as city clerk, was permitted to submit a communication addressed to the members of the city council which, according to the minutes, "raised substantive questions concerning the contemplated shift by the city from municipal refuse collection to private scavenger service." The minutes do not disclose the contents of this communication, and no copy of it appears in the record.

Three scavenger companies submitted bids before the January 12 date, and at a council meeting on December 29 these bids were opened, and the bid of one company, Clearing Disposal, Inc., which was the lowest bidder, was accepted. A fourth company, SCA Services, which had planned to submit a bid by January 12, had not done so by the time of the December 29 meeting. The mayor vetoed the award of the contract to Clearing, but the council overrode the veto at a meeting held on January 12, 1976. At that meeting the council also voted to return unopened a bid which had been received from SCA Services.

It was the meeting of December 29 at which Pechous was alleged to have initially made his defamatory statement. Counts I and II of the complaint, which were directed against Pechous, alleged:

> "1. That on December 29, 1975, at a meeting of the Berwyn City Council, The Defendant Pechous falsely and maliciously, with intent to injure the Plaintiffs' good names, uttered to third persons and caused to be published in Cook County Illinois the following false, defamatory and malicious statement, in connection with the awarding of a contract for garbage collection to Clearing Disposal, Inc. by the said Berwyn City Council which is composed of the Plaintiff Alderpersons:

'Two hundred forty pieces of silver changed hands—thirty for each alderman.'

2. That the Defendant Pechous subsequently uttered the following false, malicious, and defamatory statement concerning the Plaintiffs to the Defendant Fineman, regarding the awarding of said contract, with intent to injure the plaintiffs' good names, and thereby caused said statement to be published in an article in the Chicago Sun-Times, a newspaper printed and circulated in Cook County Illinois:

'Something smells in this contract more than garbage *** I said at the council meeting when the contract was first awarded that I think 240 pieces of silver changed hands—30 for each alderman. *** There was just something suspicious about the way that contract was approved *** I've said all along that if it were ever discovered how that contract was really approved, there'd be some vacant chairs in the city council *** There are just too many unanswered questions in the contract. The whole thing was railroaded through, and we can't help but think there was some strong motivation behind it.'

***

4. That the Defendant Pechous intended the persons who heard or read the above statements to believe that the Plaintiffs were bribed to vote to award the said contract to Clearing Disposal, Inc., and to believe that the Plaintiffs cast their votes solely for personal gain in violation of their fiduciary duty to the citizens of Berwyn and of their oaths of office and in violation of the law; and that the above statements were so understood by the persons who heard and read said statements."

Subsequent paragraphs of the complaint alleged that these statements were false, and that Pechous uttered them with knowledge that they were false or with reckless disregard as to their truth or falsity.

Count III, directed against Fineman and Field, alleged that in publishing the quoted statements these defendants did so knowing that the statements were false or with reckless disregard as to their truth or falsity. The article by Fineman is set out in its entirety as the appendix to this opinion. It was published in the May 12-13, 1976, edition of Suburban Week.

Pechous filed an answer denying each allegation of counts I and II. Fineman and Field filed an answer in which they admitted the publication of the article, but denied the other allegations of count III.

The only discovery had in this case was conducted by the plaintiffs, and it was limited to written interrogatories and notices to produce served on Pechous and Fineman. No admissions of fact were requested, and no depositions were taken by either side. The materials available for the court's consideration of the motions for summary judgment, other than the pleadings, consisted of answers to the interrogatories, documents produced, and affidavits by Fineman, Pechous, and four of the plaintiffs which were made in support of the motions for summary judgment.

The pleadings left unresolved several issues of fact: whether Pechous, at the meeting of December 29, had made the statement alleged in paragraph 1 of the complaint; whether he had made the statement to Fineman alleged in paragraph 2; whether these statements were false; and whether Pechous had made them with knowledge of their falsity or with reckless disregard of their truth or falsity. The propriety of disposing of the action upon summary judgment thus turned on whether the additional information before the court eliminated all genuine issues of material fact, as all of the parties represented in their motions.

In addition to renewing the arguments which he had made in the circuit and the appellate courts that he was entitled to summary judgment, Pechous contends in this court that summary judgment for the plaintiffs was improper since there remained in the case a controversy over whether he made the statement before the council alleged in paragraph 1 of the complaint.

As the appellate court noted in a supplemental opinion, Pechous advanced the same claim in his petition for rehearing. He also sought leave to file an affidavit by Thomas P. Hardy, a reporter for another newspaper, and a copy of an article written by Hardy about the meeting of

January 12, 1976, which he had attended. According to this article, Pechous had made a speech at this meeting questioning the legality of the award to Clearing in which he was quoted as referring to 240 pieces of silver, but in somewhat different language from that alleged in the complaint with regard to the December 29 meeting. He was reported to have said, "240 pieces of silver cemented the relationship between Clearing and the aldermen, destroying the tap roots of democracy." Hardy's affidavit did not state that he had attended the meeting of December 29, 1975. In denying leave to file the affidavit and the article, the appellate court held that Pechous was improperly seeking to introduce new evidence for the first time on appeal. (69 Ill. App. 3d 797, 813.) This ruling of the court was plainly correct.

Elimination of the affidavit does not wholly dispose of Pechous' contention that summary judgment was improper, however, for in his answer Pechous denied having made the alleged statement regarding 240 pieces of silver at the December 29 council meeting. The complaint was not verified, and the plaintiffs filed no affidavit attesting to the truth of the allegation. It should be added that the minutes of the meeting recite that Pechous was excused on account of illness shortly after the meeting began and before the matter of the bids on the garbage collection contract had been reached. That circumstance does not of course rule out the possibility that Pechous may have remained in council chambers and made his quoted remark during the balance of the meeting.

As the appellate court pointed out in its supplemental opinion, neither in his briefs nor in oral argument did Pechous challenge either the accuracy of his quoted statement or the date when it was made. Moreover, the representation made in his motion for summary judgment that there were no genuine issues of material fact necessarily presupposed that a statement had been made as alleged in the complaint. That he had made his statement at a council meeting was also the necessary predicate for the claim made in his motion for summary judgment that his

statement was protected by executive privilege and also for his claim that he had had no time in which to investigate the truth of the statement.

It is thus apparent that Pechous invited both the circuit and appellate courts to decide the case by summary judgment in the hope that the judgment would be in his favor, and that he sought to repudiate his statement only after the appellate court had rendered a judgment adverse to him. Such a course of action is barred under the doctrines of invited error and of estoppel. *Cf. People v. Van De Rostyne* (1976), 63 Ill. 2d 364, 370; *People ex rel. Scoon v. Chicago & Alton R.R. Co.* (1911), 253 Ill. 191, 196-98.

Pechous' contention would not, in any event, preclude the award of summary judgment based on his statement to Fineman as alleged in paragraph 2 of the complaint, which includes the same remark about 240 pieces of silver changing hands, since Fineman's affidavit asserts that Pechous did make that statement. We conclude, therefore, that the entry of summary judgment was not rendered improper by any genuine controversy over the making of the statements complained of.

Although neither Pechous nor the other defendants make a point of it, the issue of whether his statements were false, as alleged in the complaint but denied by the answers, was likewise not eliminated by additional information arising out of discovery, and the plaintiffs filed no affidavits denying the receipt of consideration for the award of the contract.

New York Times Co. v. Sullivan (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, holds that recovery for a defamatory statement concerning a public official may be allowed only if it is established both that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. (*Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 13 L. Ed. 2d 125, 132, 85 S. Ct. 209, 215; Restatement of Torts (Second), sec. 581A (1977).) A determination that

the defendant made his statement with actual malice does not establish that the statement was in fact false. Restatement of Torts (Second), sec. 581A, comment *f*.

The parties do not discuss the question of truth or falsity in their briefs, and it is apparent that by moving for summary judgments they elected to dispense with the necessity of resolving that question. We thus turn to the defendants' arguments on the merits, considering first the liability of Pechous.

Pechous contends that his statement was not defamatory; that even if defamatory it was protected by executive privilege; and that plaintiffs did not prove that his statements were made with actual malice, as that term is defined in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710.

As to the claim of executive privilege, Pechous asserts that since the city clerk is an officer of the government of Berwyn, such a privilege attached to his remarks under the decision in *Blair v. Walker* (1976), 64 Ill. 2d 1. The appellate court properly rejected this claim because the ordinances of Berwyn showed that the city clerk's duties with respect to the award of the contract were ministerial only, and because an affidavit by one of the plaintiffs that Pechous had no part to play in that matter was not controverted by the affidavit filed by Pechous. 69 Ill. App. 3d 797, 806-07.

We agree with the reasoning of the appellate court on this issue, and we add only a comment in response to Pechous' observation that the council permitted him to address it on the subject of the award: Those minutes of council meetings which are included in the record indicate that the council did, on occasion, permit persons other than aldermen, including private citizens, to be heard on an issue under consideration. By following that practice the council, of course, did not and could not confer an executive privilege on Pechous or any other speaker.

In discussing Pechous' claim that his statements were not defamatory, a claim also made by the other defend-

ants, we focus, as do the parties, upon his remark, "Two hundred forty pieces of silver changed hands—thirty for each alderman." (We note in passing that Pechous' statement is erroneous in assuming that all eight aldermen voted to award the contract to Clearing. The minutes disclose that only seven aldermen attended the meeting of December 29, the same seven individuals who are the plaintiffs here.)

This remark was of course not made in a literal sense. As Pechous himself states in his motion for summary judgment, the allusion to Judas' betrayal of Christ was intended to convey the thought that the plaintiffs received something of value in exchange for voting to award the contract to Clearing, and had thereby betrayed the public trust. It is not important that the statement fails to charge the criminal offenses of bribery or official misconduct with the precision of an indictment (Ill. Rev. Stat. 1979, ch. 38, pars. 33–1, 33–3). The plaintiffs were accused of venality, and such a charge would be hurtful to them. *Zeinfeld v. Hayes Freight Lines, Inc.* (1968), 41 Ill. 2d 345, 348.

The defendants' argument is that Pechous' words may be given an additional meaning which is not defamatory. Their argument is based on this court's discussion in *John v. Tribune Co.* (1962), 24 Ill. 2d 437, 442, of a "rule of innocent construction." There the court said:

> "That rule holds that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law."

We need not, however, consider this argument, for the defendants do not suggest an alternative construction of Pechous' statement which is plausible.

In the form in which the complaint alleges that it was originally made, Pechous' statement had no verbal context; it stood in isolation. As for the interview with Fineman,

Pechous repeated the statement and accompanied it with several additional comments. It is questionable to begin with whether these additional comments, made several months after the council meeting and directed to a different audience, may be considered as providing a context for Pechous' earlier utterance. Be that as it may, Pechous' comments, by specifying the consideration for which the alleged bribe was given, seem to reinforce rather than to dissipate his original charge.

There is, in any event, no merit in the suggestion made by defendants Fineman and Field that Pechous' intended meaning was that the plaintiffs "were politically motivated in voting for the Clearing Disposal Contract" for the reason that "a political ally of the plaintiffs" [John Van Tholen, Jr.,] "went to work for the parent company of Clearing Disposal the month the contract was signed." This latter development had not even occurred when Pechous delivered his statement before the council.

In a related line of argument defendants Fineman and Field, quoting a portion of a *dictum* in *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 339-40, 41 L. Ed. 2d 789, 805, 94 S. Ct. 2997, 3006-07, assert that an expression of opinion can never be actionable. Therefore, they continue, if Pechous' communication may be construed either as a statement of fact or as an expression of opinion, the rule of innocent construction requires that it be treated as the latter. Pechous' words, it is said, must be taken as asserting only that the aldermen were "acting contrary to the public interest and out of political motives." We do not find that to be a fair reading of Pechous' words. To charge that the approval of the contract was procured by a bribe cannot fairly be transmuted into a criticism of the merits of the award of the contract.

A more candid explanation of what was meant by Pechous' words is furnished by Pechous himself in a different connection. In responding to the plaintiffs' claim that he made his statement with malice he makes the following observation in his brief:

> "In view of the circumstances of the Plaintiffs-Appellees' actions in railroading a contract through the City Council without competitive bids, without advance notice to bidders and contrary to the bidding schedule established prior to the December 29th meeting, and contrary to the law, it is not unreasonable, and certainly not reckless to conclude that there may have been a payoff."

So stated, the contention that Pechous' statement was not defamatory reduces to the claim that when a charge of crime is based only on an inference drawn by the speaker, it must be treated as no more than an expression of opinion and thus ceases to be defamatory. We do not believe that such a position is supported by the language from *Gertz* on which the defendants rely. The passage, in its entirety, reads:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S., at 270." 418 U.S. 323, 339-40, 41 L. Ed. 2d 789, 805, 94 S. Ct. 2997, 3007.

The argument made here would give a defendant in a defamation suit an absolute immunity rather than the limited immunity conferred by *New York Times* on a person whose defamatory statement was made without actual malice.

The question whether an accusation of crime is a statement of fact or an expression of opinion was an issue in *Cianci v. New Times Publishing Co.* (2d Cir. 1980), 49 U.S.L.W. 2070, a recent decision by the United States Court of Appeals for the Second Circuit handed down on July 11, 1980.

The case concerned a newspaper article which stated that a former mayor of Providence, Rhode Island, then seeking reelection, had been accused some 12 years previously of committing a rape. The article reported that the victim had filed a criminal complaint, and it continued, "After receiving a $3,000 settlement, the victim dropped the charges." The defendants, the publisher and the editor of the newspaper and the author of the article, made a pretrial motion to stay discovery which the district court granted. The court of appeals reversed.

Evidence presented to the district court showed that the $3,000 paid to the victim by the plaintiff had been paid in settlement of a civil suit for damages which the victim had brought, and that the decision to drop the prosecution was made prior to and independently of the payment, as the defendants knew. As viewed by the court of appeals, the decision of the district court rested on its determination that the article did not state explicitly that the plaintiff had paid the $3,000 as part of an agreement to drop criminal charges, and that if there were any implications in the article that the plaintiff was guilty of rape or of making an improper payoff, those implications were "constitutionally protected as expressions of opinion." ——— F.2d ———.

The court of appeals reached the contrary conclusion. On the basis of the decisions of the Supreme Court in *Greenbelt Cooperative Publishing Association v. Bresler* (1970), 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537, and *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin* (1974), 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770, its own decision in *Buckley v. Littell* (2d Cir. 1976), 539 F.2d 882, *cert. denied* (1977), 429 U.S. 1062, 50 L. Ed. 2d 777, 97 S. Ct. 785, and the decision of the Court of Appeals of New York in *Rinaldi v. Holt, Rinehart & Winston, Inc.* (1977), 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied* (1977), 434 U.S. 969, 54 L. Ed. 2d 456, 98 S. Ct. 514, the court drew certain general principles and applied them to the case before it in the following words:

"[A] perjorative statement of opinion concerning a public figure generally is constitutionally protected, quite apart from *Sullivan*, no matter how vigorously expressed; (2) that this principle applies even when the statement includes a term which could refer to criminal conduct if the term could not reasonably be so understood in context; but (3) that the principle does not cover a charge which could reasonably be understood as imputing specific criminal or other wrongful acts.

It is clear from the foregoing that even if the article were to be read as only expressing the 'opinion' that Cianci committed the crimes of rape and obstruction of justice, it is not absolutely protected as distinguished from the protection afforded by *Sullivan*. The charges of rape and obstruction of justice were not employed in a 'loose, figurative sense' or as 'rhetorical hyperbole.'" ——— F.2d ———, ———.

While there are differences between the facts in *Cianci* and those of the present case, we consider that the same conclusion should be reached here.

In *Greenbelt Cooperative Publishing Association v. Bresler*, referred to and distinguished in *Cianci*, the plaintiff, a real estate developer, was seeking zoning variances from the city of Greenbelt on land which he owned. At the same time the city was endeavoring to purchase other land owned by the plaintiff for a school site. In the negotiations with the city the plaintiff was conditioning the sale of his land upon a grant of the zoning variances. The defendant newspaper published an article describing a public meeting of the city council in which it was correctly stated that some persons attending the meeting had characterized the plaintiff's position as "blackmail."

A judgment in the plaintiff's favor was reversed by the Supreme Court. One ground for the reversal was that the use of the word "blackmail" did not charge the plaintiff with the commission of that crime, since "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used

by those who considered Bresler's negotiating position extremely unreasonable." (398 U.S. 6, 14, 26 L. Ed. 2d 6, 15, 90 S. Ct. 1537, 1542.) As the court of appeals noted in *Cianci* (—— F.2d ——, ——), the clear implication of the opinion was that an accusation of actual wrongdoing would have been held actionable. There is a crucial difference between *Greenbelt* and the present case: In *Greenbelt* the word "blackmail" was used to convey the speaker's negative evaluation of conduct by the plaintiff which was known to both the speaker and his audience. In the case before us Pechous' charge of bribery, while of course it evidences his disapproval of the award of the contract, also informs his audience that a criminal act of which the audience was unaware has been committed by the aldermen.

In *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin* (1974), 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770, an article in a union newsletter referred to persons who had not joined the union as scabs and quoted a well-known author's definition of a scab which characterized a scab as being, among other things, a "traitor to his country." Since the term "scab" has the common meaning of one who refuses to join a union, the Supreme Court, following *Greenbelt*, held that no reader could have understood its use to have amounted to a charge of treason. 418 U.S. 264, 283-86, 41 L. Ed. 2d 745, 761-63, 94 S. Ct. 2770, 2781-82.

In *Buckley v. Littell* (2d Cir. 1976), 539 F.2d 882, a statement was made in the defendant's book that the plaintiff was a "fellow traveler of fascists." The court held that that statement could not be treated as defamatory because the terms used were so imprecise as to make it impossible to prove the assertion false. A further assertion by the defendant that the plaintiff had made libellous statements about other persons, however, was held to be a statement of fact and therefore actionable. 539 F.2d 882, 895-96.

Rinaldi v. Holt, Rinehart & Winston, Inc. (1977), 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, was a defamation suit brought by a trial judge over published assertions that his sentences in certain named criminal cases showed that he was "incompetent," "probably corrupt," and "suspiciously lenient." The court of appeals held that the assertion that the plaintiff was incompetent was a constitutionally protected expression of opinion, but that the other assertions were not. The court stated:

> "Newfield's assertions that plaintiff is 'probably corrupt' and that his sentences of certain defendants were suspiciously lenient, with their strong undertones of conspiracy and illegality, rest on a different footing than his opinions as to plaintiff's judicial performance. These words were not used merely in a 'loose, figurative sense' to demonstrate Newfield's strong disagreement with some of plaintiff's dispositions. [Citations.] The ordinary and average reader would likely understand the use of these words, in the context of the entire article, as meaning that plaintiff had committed illegal and unethical actions. Accusations of criminal activity, even in the form of opinion, are not constitutionally protected." 42 N.Y.2d 369, 381-82, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951.

To summarize our decision on this branch of the case, we hold that Pechous' statements "Two Hundred Forty pieces of silver changed hands—thirty for each alderman" and "I think Two Hundred forty pieces of silver changed hands—thirty for each alderman," as made before the council and in his interview with Fineman, respectively, charged that the plaintiffs were paid a bribe for awarding the garbage-collection contract to Clearing; that the statement was defamatory; that it was not capable of an alternative reading which would render it nondefamatory; that it was a statement of fact and not the constitutionally protected expression of an opinion; and that it was not protected by executive privilege.

The remaining question regarding Pechous' liability is whether he made his statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 280, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.

The materials before the trial court included Pechous' answers to interrogatories. One interrogatory asked him to detail any investigation he made of the circumstances of the awarding of the contract, and to describe any information produced by his investigation. Pechous' answer was: "No formal investigation. However, the Minutes of December 29, 1975, indicate substantial deviations from prescribed municipal contracting procedure." His answer identified seven paragraphs of the minutes to which reference was made.

Another interrogatory asked him to specify the factual basis on which he had made each of the statements quoted in the newspaper article. To this Pechous answered: "See above and documents submitted." A third interrogatory stated: "Specify any personal knowledge you have that when said contract was so awarded '240 pieces of silver changed hands—30 for each alderman.' " The interrogatory further requested Pechous, if he did not have such personal knowledge, to "specify any other evidence you have which would support your said statement." The same interrogatory was asked regarding each of the other statements quoted in the article. To each of these interrogatories Pechous responded, "See above and documents submitted." The documents submitted included minutes of various meetings of the council and other material not described in the affidavit. It appears from Pechous' brief, however, that they consisted of letters to the council from the mayor and the city attorney, and other public documents relating to the contract.

From the answers to interrogatories, which operate as admissions (73 Ill. 2d Rules 212(a)(2), 213(f)), we must conclude that Pechous had no personal knowledge of the alleged act of bribery, that he had not been informed of it

by another person, and that he had no documentary evidence of it. We must also conclude that Pechous did not attempt to verify his statement by an inquiry directed to any of the aldermen or to persons associated with Clearing.

Finally there was an affidavit by Pechous attached to his motion for summary judgment which stated: "[A]ffiant did not act with malice in making the comments he did because his own brother was one of the aldermen being criticized by affiant." (The minutes of the December 29, 1975, meeting recite that Alderman Pechous, the defendant's brother, was not present.)

In the *New York Times* line of cases the reckless disregard for the truth which is requisite to a proof of malice is described in subjective terms: Recklessness is said to exist only where a defendant "in fact entertained serious doubts as to the truth of his publication" (*St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267, 88 S. Ct. 1323, 1325) or where he had a "high degree of awareness of *** probable falsity" (*Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 13 L. Ed. 2d 125, 133, 85 S. Ct. 209, 216; *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 335 n.6, 41 L. Ed. 2d 789, 802-03 n.6, 94 S. Ct. 2997, 3004 n.6; *cf. Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 153, 18 L. Ed. 2d 1094, 1110, 87 S. Ct. 1975, 1990).

With a few exceptions (see *Cantrell v. Forest City Publishing Co.* (1974), 419 U.S. 245, 42 L. Ed. 2d 419, 95 S. Ct. 465; *Time, Inc. v. Hill* (1967), 385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534; *Ocala Star-Banner Co. v. Damron* (1971), 401 U.S. 295, 28 L. Ed. 2d 57, 91 S. Ct. 628), the cases before the Supreme Court involving the *New York Times* rule have been primarily concerned with the liability of a defendant, often a newspaper, for reporting a defamatory statement made by another person, and the court's discussion of malice has taken place in that context.

Here, however, we are concerned with a defendant who was, as his answers to interrogatories show, the original source of the defamatory statement. The basis

for his charge of bribery, according to his brief, was only an inference which he drew from what he considered to be the precipitous manner in which the award was made. As the defendants Fineman and Field observe in their brief, bribery was not the only thing which could have been inferred as the cause of the award. Political motivations, such as a desire by the aldermen to remove patronage jobs from the mayor's control, could also have been the explanation. Pechous made no inquiry to ascertain whether it was his inference rather than another which was the correct one to draw.

Under these circumstances Pechous' statement, if not indeed a "calculated falsehood," was, at the least, made with reckless disregard of whether it was true. (See *Cantrell v. Forest City Publishing Co.* (1974), 419 U.S. 245, 253-54, 42 L. Ed. 2d 419, 427-28, 95 S. Ct. 465, 470-71.) His affidavit did not unqualifiedly declare that he believed his statement to be true. Even if it had done so, we question whether it would negate the showing of actual malice. As the Supreme Court said in *St. Amant v. Thompson* (1968), 390 U.S. 727, 732, 20 L. Ed. 2d 262, 267-68, 88 S. Ct. 1323, 1326:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call."

We therefore affirm the decision of the appellate court with respect to Pechous.

With respect to defendants Fineman and Field there remain for consideration two questions not already disposed of. The first of these is whether the newspaper article involved was privileged as a report of governmental proceedings, a question which the appellate court answered in the affirmative.

The defendants rely principally on *Lulay v. Peoria Journal-Star* (1966), 34 Ill. 2d 112. That case dealt with a statement made in a government report rather than a statement made at a meeting of a governmental body, but the court, following section 611 of the Restatement of Torts, (1938), stated that a privilege to report government proceedings existed. 34 Ill. 2d 112, 115.

Under section 611, as it then read, the privilege was defeasible if the statement was made with malice, in the common law sense of the term. When *Lulay* was decided that limitation had of course been rendered obsolete by *New York Times Co. v. Sullivan*. Section 611 of the Restatement (Second) of Torts (1977) now reads:

> Sec. 611. Report of Official Proceeding or Public Meeting
>
> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Comment *a* to the section states that the privilege is lost if the report is not accurate, but the plaintiffs raise no question on that score. They do point out, however, that Fineman did not attend the council meeting, that the article was not published until five months later, that its report of the meeting was based on the account given by Pechous, and that not all of the statements by Pechous which appear in the article were made at the meeting. These points raise questions not addressed in *Lulay*. We need not decide them, however, for we hold that actual malice on the part of these defendants has not been shown.

At common law a person who republished a defamatory statement made by another was himself liable for defamation even though he gave the name of the originator (Restatement of Torts sec. 578 (1938)). Although the absolute liability which attached to defamation at common law was supplanted as to public officials and public figures by *New York Times Co. v. Sullivan* and its sequels, the republisher of a defamatory statement

made by another remains subject to liability (Restatement (Second) of Torts sec. 578 (1977)), but he cannot be held liable unless he himself knew at the time when the statement was published that it was false, or acted in reckless disregard of its truth or falsity. It is not sufficient that the originator of the statement made it with actual malice. Our holding that Pechous is liable is therefore not dispositive as to the liability of the other defendants.

As noted previously in this opinion, the United States Supreme Court has equated reckless disregard of the truth with subjective awareness of falsity or probable falsity (*St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267, 88 S. Ct. 1323, 1325), and in his affidavit Fineman stated that at no time did he believe that any statement in his article was false. The plaintiffs seek to impeach the affidavit by Fineman's statement in his answers to interrogatories that each alderman had denied taking a payoff for the award of the contract. We do not consider, however, that a denial by one who is charged with having committed a criminal act would necessarily lead a reporter to doubt the truth of the charge. (*Edwards v. National Audubon Society, Inc.* (2d Cir. 1977), 556 F.2d 113, *cert. denied* (1977), 434 U.S. 1002, 54 L. Ed. 2d 498, 98 S. Ct. 647.) That Fineman's investigation did not yield any facts which would have confirmed Pechous' charge is also, for similar reasons, without significance.

The plaintiffs point to the following words that appear in Fineman's handwritten notes of the interviews which he made in the course of his investigation: "Strongly feel $ has changed hands instinctive feeling." At the top of the page immediately preceding that on which the quoted words appear are the words "Bob Pechous," and the plaintiffs would have us interpret the quotation as representing something said to Fineman by Pechous. Such a comment, they argue, should have made Fineman aware that Pechous had no factual basis for his defamatory statement.

We cannot accept the premise of the plaintiffs' argument. Fineman's notes are not a verbatim transcript of his interviews, but only rough notes, many of them indecipherable, taken during his interviews. It is not possible from the notes alone to identify an item as a statement made by the interviewee as opposed to what may be a question or a supposition in the mind of Fineman. The notes do not speak for themselves. Without extrinsic evidence, the plaintiffs cannot establish the import of the quoted words or the accuracy of their transcription.

We are reminded that the proof that Fineman doubted the truth of Pechous' defamatory statement must be made "with the convincing clarity." (*Rosenblum v. Metromedia, Inc.* (1971), 403 U.S. 29, 55, 29 L. Ed. 2d 296, 318, 91 S. Ct. 1811, 1825.) The plaintiffs' evidence falls far short of that standard.

Our opinion is not to be taken as intimating that the conclusion we reach would be the same had it been shown, by way of depositions, answers to interrogatories, admissions, or affidavits, that Pechous had told Fineman that his charge of bribery was prompted by "instinct" alone and that he had no evidence to support it. Notwithstanding Fineman's affidavit that he did not doubt the truth of his article, in the case supposed it might be concluded that Fineman had not made the affidavit in good faith. *St. Amant v. Thompson* (1968), 390 U.S. 727, 732, 20 L. Ed. 2d 262, 267-68, 88 S. Ct. 1323, 1326.

We think it is also appropriate to state that in holding that Pechous is liable and that the other defendants are not, we are not, as the plaintiffs assert, applying different standards, and we are not indicating approval of the position taken by the court in *Edwards v. National Audubon Society, Inc.* (2d Cir. 1977), 556 F.2d 113, *cert. denied* (1977), 434 U.S. 1002, 54 L. Ed. 2d 498, 98 S. Ct. 647, that a newspaper, under some circumstances, is protected against liability in reporting a defamatory

statement about a public official or public figure even if the newspaper knew that the statement was false. *Cf. Dickey v. CBS, Inc.* (3d Cir. 1978), 583 F.2d 1221, 1225.

For the reasons given in this opinion the judgment of the appellate court is affirmed.

Judgment affirmed.

APPENDIX

"BERWYN TRASH PACT RAISES STINK

By Mark Fineman

The City of Berwyn's recently awarded and highly controversial municipal garbage contract, like others in the suburbs, was approved amid strong charges and countercharges.

'Something smells in this contract more than garbage,' charged City Clerk Robert C. Pechous, who opposed the city council's decision last December to scrap Berwyn's municipal residential-garbage service and contract with a private scavenger.

'I said at the council meeting when the contract was first awarded that I think 240 pieces of silver changed hands—30 for each alderman,' Pechous added. 'There was just something suspicious about the way that contract was approved.'

Berwyn's eight aldermen claim Pechous' statements are politically motivated. (Pechous, a candidate for state representative in the 7th District, is a Democrat. All but one of the aldermen are Republicans.)

When contacted by Suburban Week, all the aldermen vehemently denied taking payoffs. One alderman read a two-page statement denying the allegations at a recent city-council meeting. And several aldermen have threatened to sue Pechous over his charges.

But a Suburban Week investigation of the awarding of the contract indicates that a close political ally of the aldermen, John Van Tholen, Jr., who publicly supported awarding the contract to Clearing Disposal Co., a subsidiary of Waste Management Inc., was given a high-level WMI position shortly after the council approved the Clearing contract.

Van Tholen and several of the alderman are active members of the Berwyn Regular Republican Organization. He was once appointed Berwyn streets superintendent

by the city council, but that appointment was later nullified in Cook County Circuit Court. Van Tholen was hired by WMI in January just after the contract was awarded.

At least one inside industry source claims the WMI job 'was a reward for having made sure the Berwyn contract was given to Clearing.'

Van Tholen denied the charges.

'I had nothing to do with it (the awarding of the contract). The night they were deciding on the contract, I went up to John DeBoer (a WMI representative) and asked if there would be a job open at Clearing,' claimed Van Tholen, who owned his own scavenger business for 28 years. 'That was it. As far as I know, that job wasn't a reward at all.'

Most of the aldermen have admitted they are friends of Van Tholen's, but all denied that Van Tholen influenced their decision to award the contract to Clearing.

'I've known John Van Tholen for years and years. He lives in my ward,' said Ald. Raymond G. Cox, the only non-Republican on the city council. 'But that didn't enter into it at all. This contract is saving the people of Berwyn money. That's the only reason we approved it. Friendship wasn't involved.'

But there were other suspicious circumstances surrounding the awarding of the contract, according to an industry source.

Bidding against Clearing Disposal on the contract was a Berwyn-based scavenger firm, the C. Groot Automatic Disposal Co. According to Securities and Exchange Commission documents, the Groot firm is owned by John C. Groot, a WMI stockholder and one of WMI's eight founders.

A WMI spokesman confirmed that Groot is a stockholder in WMI, but he said WMI is in no way connected to the Groot firm.

However, at least one industry source claimed the Groot firm's bid of $3.55 a month for each Berwyn family was never intended to be competitive against Clearing's bid of $3.15 per family. The only other bid received at that time was from Van Der Molen Disposal Co., a subsidiary of Browning Ferris Industries. That firm's bid was $3.20.

Those bids on the initial garbage contract, awarded last Dec. 29, were later thrown out by Circuit Court Judge Francis Delaney after both Berwyn Democratic administration officials and another private scavenger firm filed suit against the aldermen.

Delaney ordered the aldermen to readvertise for bids and approve a second contract. Clearing Disposal's second bid was still lowest and it received the existing contract last February.

Some Berwyn officials have said they're considering turning over information on the awarding of the contract to federal authorities.

'I've said all along that if it were ever discovered how that contract was really approved, there'd be some vacant chairs in the city council,' charged City Clerk Pechous. 'There are just too many unanswered questions in the contract. The whole thing was railroaded through, and we can't help but think there was some stronger motivation behind it.' "

APPENDIX B

MR. JUSTICE CLARK, dissenting:

MR. JUSTICE CLARK, concurring in part and dissenting in part:

I have concluded that the fair-comment privilege should protect the statements complained of. If the statements should not be so protected, however, I have concluded that the majority has misapplied both our own standard for summary judgments and the actual-malice standard of *New York Times.*

Plaintiffs' unverified complaint was filed on June 28, 1976. Pechous' answer was filed on July 30 of that year. Defendants Fineman and Field moved for summary judgment on October 26, 1976. Plaintiffs' reply and cross-motion for summary judgment was filed May 31, 1977. The trial court granted defendants' motion and denied plaintiffs' cross-motion on June 9, 1977. The relevant portion of the trial court's order was as follows:

"1. The statements by Defendant Pechous which appear in the article do not fall within the scope of Lulay v. Peoria Journal-Star, Inc., 34 Ill. 2d 112, and related cases or within the scope of Blair v. Walker, 64 Ill. 2d 1 and related cases.

2. Their [*sic*] is a question of fact about whether Defendants Fineman and Field Enterprises, Inc. published the article in question with actual malice as defined in New York Times Company v. Sullivan, 376 U.S. 254 and related cases.

> 3. Application of the 'innocent construction' rule of John v. Tribune Co., 24 Ill. 2d 437 renders the statements in the article non-actionable against Defendants Fineman and Field Enterprises, Inc."

Defendant Pechous then moved, on July 18, 1977, for summary judgment on grounds that his statement expressed an opinion, on grounds that his statement could be innocently construed, and on grounds that the court had already dismissed the other defendants. Plaintiff's reply and cross-motion argued that defendant's statement was libelous *per se*, that it could not be construed innocently, that the trial court's ruling as to Fineman and Field was not binding as to Pechous, and that Pechous' statement was made with actual malice.

The actual-malice argument of the plaintiffs was premised upon Pechous' alleged failure to provide facts supporting a charge of bribery and that "[n]othing in any other document submitted by defendant Pechous pursuant to plaintiffs [*sic*] interrogatories and request provides any basis for said Defendant's accusation against Plaintiffs." The trial court, on September 22, 1977, granted defendant's summary judgment motion solely on the basis of the innocent-construction rule and did not rule on whether there was a question of fact about defendant's alleged actual malice.

The facts submitted and argued to the trial court and deemed relevant by all sides included primarily documents submitted by Pechous in response to plaintiffs' interrogatories. Included among these documents were the minutes of the December 29, 1975, council meeting, commented upon only briefly by the majority. The minutes show that Pechous' brother was absent. Item 1B of the minutes, located prior to any consideration of the garbage contract, states:

> "The City Clerk requested that he be excused because he is ill and thereupon a motion by Alderman Cox, seconded by Alderman Catalano was made designating the Comptroller be Clerk Pro-Tem for this meeting. On a voice vote the Mayor declared MOTION CARRIED."

Pechous' signature is affixed below this item. The minutes of this meeting show, moreover, the name of each person who spoke on the question of the garbage contract, including the names of private citizens and city officials speaking as private citizens. Defendant Pechous' name does not appear in the minutes after he was listed as excused on account of illness.

The minutes also reveal that the council decided to open the sealed bids only of those companies represented at the meeting. After a short recess, the aldermen declared that an emergency necessitated an appropriation of $600,000 for a private-scavenger-service contract for 1976. A second motion was then passed to accept the bid of Clearing Disposal, Inc., and providing that "such contract be awarded without the necessity of advertising for competitive bids." Two motions were also passed to reduce the employment status and salary of the commissioner of public works and the city attorney. Both of these individuals opposed the move to a private scavenger service. The minutes disclose, too, that John Van Tholen, Jr., spoke at the meeting just prior to the adoption of motions to accept the bid of Clearing Disposal, Inc.

The other documents submitted on the record by Pechous and which the plaintiffs, by the excerpt of their summary judgment motion quoted above, admitted to the trial court were relevant, reveal that Pechous was not the only city official "imagining" improprieties. The mayor vetoed the motions passed at the December 29 meeting. His message, dated January 5, 1976, stated in part:

> "The worst act of deceit was that practiced by the Public Works Committee. At their 7:00 o'clock Committee meeting on December 29, 1975, there was a discussion of the pros and cons of awarding a private scavenger contract, but the meeting was adjourned with the private scavenger operators present (except three favored firms who just happened to remain after the Committee meeting) assuming that the Council would consider the sealed bids submitted as a result of the advertisement as required by law and to be opened on January 12, 1976. Why didn't Alderman Clifford tell all the prospective bidders to remain? Why didn't all prospective bidders have an equal chance to receive the

> contract? It wasn't a spur of the moment decision to award a contract last Monday. The Aldermen all had been primed in advance. Alderman Clifford had the statutory provisions they relied on written out. Alderman Slawko and Alderman Catalano quoted liberally from them during discussions on the Council floor.
>
> You must have met secretly somewhere before the meeting—why don't you let the citizens in on your plans? What was the need for secrecy? Were you planning the strategy so you could selectively award the contract? Were you afraid the people would object? What was your rush?"

In a separate message sent on the same day, the mayor explained that the city council's action violated section 8—1—6 of the Illinois Municipal Code. A third message from the mayor explained his veto of the motions to reduce the employment status and salaries of the commissioner of public works and the city attorney in these words:

> "The City Council's actions are also an obviously vindictive attempt to force fine and dedicated public officers to resign because of the large salary cuts involved. *** Lastly, however, and a far greater reason for my vetoes, is the fact that this series of Ordinances and Resolutions are directly contrary to the Decrees of Judge Arthur Dunne and the injunctive orders he has issued in connection with the Council's attempts to effect [*sic*] these very City offices."

The city attorney, in a separate message also dated January 5, 1977, advised the council:

> "[I]n my legal opinion, the declaration of an emergency as articulated by you is inadequate and your actions last week in declaring an emergency are illegal.
>
> The validity of this contract lies, of course, on the validity of your actions last week. You violated the bidding laws by a spurious declaration of emergency when none apparently then existed. By so doing you have opened the City to claims by private scavenger firms who were not favored by being included in the private bidding engaged in last week."

Thus, not only was the original award of the contract declared illegal, as noted in the article at issue and uncontroverted by plaintiffs, but as the latter messages indicate (and their accuracy was not challenged) additional illegalities and improprieties were perpetrated by the city council.

Applying the actual-malice standard, the "pleadings left unresolved several issues of fact: whether Pechous, at the meeting of December 29, had made the statement alleged in paragraph 1 of the complaint; whether he had made the statement to Fineman alleged in paragraph 2; whether these statements were false; and whether Pechous had made them with knowledge of their falsity or with reckless disregard of their truth or falsity." (Slip op. at 3-4.) To grant plaintiffs' motion for summary judgment against Pechous, all of these issues would have to be resolved against him. The inquiry should be undertaken, as the majority purports to do, without consideration of the affidavit of Thomas P. Hardy.

The majority argues that Pechous must be considered to have made his remarks on December 29 because he is repudiating the date of the statement only after an adverse judgment, a course of action barred by *People v. Van De Rostyne* (1976), 63 Ill. 2d 364, 370, and *People ex rel. Scoon v. Chicago & Alton R.R. Co.* (1911), 253 Ill. 191, 196-98. I find these cases inapposite. In *Van De Rostyne*, the court noted that "the action of the trial court resulted from the error of the defendant in mislabeling his motion, and he should not now be permitted to profit by that error." (63 Ill. 2d 364, 370.) In *Chicago & Alton R.R. Co.*, one of the parties attempted to submit new information, after the court's decision, which was contrary to the statement of the case provided in the briefs and arguments.

In the instant case, in contrast, Pechous filed an answer which denied every factual allegation of the plaintiffs' complaint. By moving for summary judgment on the basis of the innocent-construction rule, Pechous might be considered to have admitted that he made the statement alleged in the complaint, but he did not thereby indicate that he made the statement on December 29. The innocent-construction rule renders immaterial any inquiry as to a defendant's actual malice and any consideration of when the statement was made. By contending that there was "no genuine issue as to any *material* fact ***" (emphasis added) (Ill. Rev. Stat. 1977, ch. 110, par. 57(3)),

on the bases he argued, he was not contravening his answer's denial of the other allegations in the complaint.

In *Carruthers v. B. C. Christopher & Co.* (1974), 57 Ill. 2d 376, 380, this court said that "[e]ven though a complaint and answer may purport to raise issues of material fact, if such issues are not further supported by evidentiary facts through affidavits or such, summary judgment is then appropriate. [Citation.] *If* the party moving for summary judgment supplies facts which, if not contradicted, would entitle such a party to a judgment as a matter of law, the opposing party cannot rely upon his complaint or answer alone to raise genuine issues of material fact." (Emphasis added.) In this case, the plaintiffs have been granted summary judgment against Pechous on the basis of a statement alleged in an unverified complaint to have been made on December 29, without supporting that allegation with a single evidentiary fact, *i.e.*, without supplying an evidentiary fact which would entitle them to a judgment as a matter of law. The plaintiffs have relied upon their unverified complaint to do more than raise an issue of material fact; they have won a judgment on that basis. Therefore, the validity of *Carruthers* is open to question.

Waiver and estoppel, moreover, are double-edged swords. Plaintiffs admitted in the trial court that Pechous' statements could be considered with reference to the documents he submitted in response to plaintiffs' interrogatories. Many of these documents existed only after the December 29 meeting, and plaintiffs never challenged their relevance in the court on this basis. Generally issues not presented to the trial court cannot be presented for the first time on appeal. (*People ex rel. Wilcox v. Equity Funding Life Insurance Co.* (1975), 61 Ill. 2d 303, 313; *Kraus v. Smith Marine, Inc.* (1975), 60 Ill. 2d 141, 147; *Little Sister Coal Corp. v. Dawson* (1970), 45 Ill. 2d 342, 349.) Had the plaintiffs in the trial court relied upon an allegation that Pechous had no knowledge of the circumstances indicated in the messages of the mayor and city

attorney, Pechous would then have had an opportunity to contravene that argument in the trial court, by denying the allegation, by submitting additional evidence, or by pointing out the evidence which was properly in the record and which indicated that he could not have made his statement on December 29. The plaintiffs have illegitimately prejudiced Pechous by waiting until the case was on appeal to argue that the documents Pechous submitted in response to interrogatories were irrelevant to the statement alleged in the first paragraph of the complaint. We should not selectively apply the doctrines of waiver and estoppel; the case should remain as the parties shaped it in the trial court.

Thus, Pechous did not *erroneously* assume that "all eight aldermen voted to award the contract ***" or *mistakenly* say that his brother was a subject of his critical remarks. He correctly assumed all eight aldermen voted to award the contract and correctly included his brother as a subject of his remarks, because they were made at a meeting when his brother was present.

Even if it were beyond dispute that Pechous first made his statement on December 29, it does not follow that it was made with actual malice as a matter of law. Professor Laycock, one of the reporters to the Committee on Motion Practice of the Illinois Judicial Conference, in an article expressing his own views, has explained that in a summary judgment motion the movant concedes that well-alleged facts "submitted in opposition are true." He continues:

> **"[S]imilarly, well-alleged facts submitted in support of the motion are taken as true unless contradicted by well-alleged facts. However, affidavits supporting the motion are strictly construed, whereas affidavits opposing the motion are liberally construed. An oft-stated but incorrect assumption is that both sides' affidavits must be construed strictly. In reality, the rules are stacked against the movant, who must show beyond doubt that he is entitled to judgment.**
>
> **Even if the physical facts are completely undisputed, there may be a triable dispute over the characterization of those facts, or the inferences to be drawn therefrom. Moreover, characterization of the facts may depend on nuances**

> and deta not easily developed by affidavit. Thus, it is rarely possible to grant summary judgment on certain issues, for example, negligence. *** Similarly, questions of motive, intent, or subjective feelings are rarely appropriate for summary judgment. *** If the affidavits and other materials disclose a genuinely disputed material issue, summary judgment must be denied no matter how likely the court thinks it is that the movant will win at trial. Summary judgment cannot be used to try the disputed issue.
>
> * * *
>
> A commonly heard statement is that when both sides move for summary judgment, they agree that only a question of law is involved. This is not always true, *e.g.*, if the motions are unrelated, as where plaintiff moves for summary judgment on the merits and defendant moves for summary judgment on the ground that plaintiff lacks standing. In any event, the parties' agreement is not binding on the court; it may deny both motions if it finds a material issue of fact. The normal standards are to be applied to each motion, and they should be considered independently. All the affidavits may be considered on both motions, but those that are strictly construed with respect to one motion will be liberally construed with respect to the other, and vice versa." (Laycock, *Dispositive Pre-Trial Motions in Illinois–Sections 45, 48 and 57 of the Civil Practice Act*, 9 Loy. Chi. L. Rev. 823, 848-51 (1978).)

The United States Supreme Court has twice recently reminded us that "proof of 'actual malice' calls a defendant's state of mind into question [citation] and does not readily lend itself to summary disposition." (*Hutchinson v. Proxmire* (1979), 443 U.S. 111, 120 n.9, 61 L. Ed. 2d 411, 422 n.9, 99 S. Ct. 2675, 2680 n.9; *Wolston v. Reader's Digest Association, Inc.* (1979), 443 U.S. 157, 161 n.3, 61 L. Ed. 2d 450, 456 n.3, 99 S. Ct. 2701, 2704 n.3.

This court has noted previously "the movement away from objective standards of reasonable or reckless conduct, and toward an emphasis upon the subjective frame of mind of the actor, which has characterized the development of the new constitutional common law of libel." (*Tunnell v. Edwardsville Intelligencer, Inc.* (1969), 43 Ill. 2d 239, 247.) Pechous, in an affidavit based upon his personal knowledge, denied that his statement was made with actual malice. The credibility of that denial is a dis-

puted issue here, and the plaintiffs have the burden of proving that denial incredible. Such an issue should be resolved by a fact finder who can judge Pechous' demeanor and his contentions as tested by cross-examination at trial. The majority opinion contravenes the formerly well-settled principle that "[t]he court cannot determine the truth of defendant's affidavit of merits in a summary judgment proceeding." *Diversey Liquidating Corp. v. Neunkirchen* (1939), 370 Ill. 523, 530; see also *Zeinfeld v. Hayes Freight Lines, Inc.* (1968), 41 Ill. 2d 345; *Ray v. City of Chicago* (1960), 19 Ill. 2d 593; *Pilson v. Roush* (1980), 82 Ill. App. 3d 187.) And the *St. Amant* case (*St. Amant v. Thompson* (1968), 390 U.S. 727, 732, 20 L. Ed. 2d 262, 267-68, 88 S. Ct. 1323, 1326), cited by the majority in support of its holding, does not support the grant of summary judgment here. The court there said the "[p]rofessions of good faith will be unlikely to prove persuasive, for example, where a story is [fabricated, imagined or based on an anonymous, unverified telephone call]." (*St. Amant v. Thompson* (1968), 390 U.S. 727, 732, 20 L. Ed. 2d 262, 267-68, 88 S. Ct. 1322, 1326.) The court did not rule out the possibility, however, that a "finder of fact" would be persuaded under those circumstances of a defendant's good faith; the court was clearly discussing permissive inferences which a trier of fact might or might not choose to draw.

Nor are the circumstances discussed in *St. Amant* necessarily present here.

One reason for this latter belief is the majority's distorted construction of Pechous' answers to plaintiffs' interrogatories. Plaintiffs never even asked Pechous in the interrogatories about the alleged December 29 statement. The precise interrogatory about his investigation was:

> **"1. With reference to an article, entitled Berwyn Trash Pact Raises Stink, written by Mark Fineman and published in the May 12-13, 1976 edition of *Suburban Week*, a publication of Field Enterprises, Inc., a copy of which is attached to the complaint herein as Exhibit A:**
>
> **a. *****
>
> **b. Detail any investigation you made of the circumstances of the awarding of said contract."**

Pechous' answer, that he conducted "[n]o formal investigation," is an understandable response to this question. He had no power to convene a grand jury or to deploy investigators on this case. In interrogatory 1(c) he detailed the information he provided to defendant Fineman, which included previously discussed information like the minutes of the December 29 meeting, the mayor's veto, the motion to override the veto, the city attorney's communication, and also (1) the minutes of the January 5 and January 12 meetings, which indicated that the council voted to reject unopened the bid of SCA Services, Inc., on the very date they had previously set for the submission of all bids, (2) a telegram from SCA declaring unlawful the award of the contract to Clearing Disposal, Inc., and indicating that the council's actions might be referred to the U.S. Attorney's office, and (3) the information that John Van Tholen, Jr., had been hired by Clearing Disposal, Inc. His answer that no formal investigation had been undertaken must be considered insignificant in comparison to the information he had collected and turned over to the reporter.

If the "no formal investigation" answer is combined with the erroneous assumption that he made his initial statement on December 29, the picture painted is one of irresponsibility. I find this picture inaccurate because the answer in context reveals that he did take substantial measures to collect relevant and damning information before talking to the reporter and because the information collected was, as plaintiffs conceded in the trial court, available to Pechous when he first made his statement.

I also consider that the majority has misinterpreted the meaning of Pechous' communication. I cannot conclude, because of the ambiguity surrounding the initial date of his statement, that John Van Tholen, Jr., had not been hired by the present company of Clearing Disposal when Pechous first made his statement. Pechous' statement, in my view, could be understood to have imputed that a *quid pro quo* took place, a "singularly imprecise" but nonactionable characterization of the relation between John Van Tholen, Jr., the aldermen and Clearing Disposal. See *Tunnell v. Edwardsville Intelligencer, Inc.* (1969), 43 Ill. 2d 239, 246-47.

I note in passing that the majority, in its discussion of Pechous' intended meaning, has forgone an opportunity to clear up the confusion over the innocent-construction rule. The rule has been inconsistently applied and recently ignored in this court. (Compare *Coursey v. Greater Niles Township Publishing Corp.* (1968), 40 Ill. 2d 257, and *Valentine v. North American Co.* (1974), 60 Ill. 2d 168, which purport to apply the rule, with *Suchomel v. Suburban Life Newspaper, Inc.* (1968), 40 Ill. 2d 32, *Tunnell v. Edwardsville Intelligencer, Inc.* (1969), 43 Ill. 2d 239, and *Troman v. Wood* (1975), 62 Ill. 2d 184, which do not apply the rule.) Nor can the standard announced in *Troman* (62 Ill. 2d 184) be reconciled with the standard announced in *John v. Tribune Co.* (1962), 24 Ill. 2d 437. If the disregard of *stare decisis* among judges of appellate courts is problematical (see Schaefer, *Forward: Stare Decisis and the "Law of the Circuit,"* 28 De Paul L. Rev. 565 (1979); Mattis and Yalowitz, *Stare Decisis Among* [*sic*] *the Appellate Court of Illinois*, 28 De Paul L. Rev. 571 (1979)), surely it is intolerable to have the innocent-construction rule consistently applied in the circuit courts and the appellate courts while it is ignored in this court.

I think, in sum, that as to Pechous, assuming that the actual-malice standard is applicable, either summary judgment should be granted in his favor or the case should be remanded for trial.

As to defendants Fineman and Field, on this record I find their conduct more culpable than Pechous'. In *Herbert v. Lando* (1979), 441 U.S. 153, 156-57, 60 L. Ed. 2d 115, 121-22, 99 S. Ct. 1635, 1639, the court stated that defamation plaintiffs must prove that the defendants "had published a damaging falsehood 'with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' This was the holding of *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 [11 L. Ed. 2d 686, 84 S. Ct. 710] (1964), with respect to alleged libels of public officials, and extended to 'public figures' by *Curtis Publishing Co. v. Butts*, 388 U.S. 130 [18 L. Ed. 2d 1094, 87 S. Ct. 1975] (1967). Under

this rule, absent knowing falsehood, liability requires proof of reckless disregard for truth, that is, that the defendant 'in fact entertained serious doubts as to the truth of his publication.' *St. Amant v. Thompson*, 390 U.S. 727, 731 [20 L. Ed. 2d 262, 267, 88 S. Ct. 1323, 1325] (1968). Such 'subjective awareness of probable falsity,' *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 [41 L. Ed. 2d 789, 802 n.6, 94 S. Ct. 2997, 3004 n.6] (1974), may be found if 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' *St. Amant v. Thompson*, [390 U.S. 727, 732, 20 L. Ed. 2d 262, 267-68, 88 S. Ct. 1323, 1326 (1968)]." The court also noted that it had affirmed a jury verdict of liability for defamation in *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 by examining "direct as well as indirect evidence" for proof of actual malice. (*Herbert v. Lando* (1979), 441 U.S. 153, 160, 60 L. Ed. 2d 115, 124, 99 S. Ct. 1635, 1641.) Information on that record and considered probative included, *inter alia*, the Saturday Evening Post's motives in publishing the story at issue, its sources and its "conclusions as to the importance and veracity of sources and information presented in the article." See *Herbert v. Lando* (1979), 441 U.S. 153, 157-61 & nn. 2 & 6, 60 L. Ed. 2d 115, 122-24 nn. 2 & 6, 99 S. Ct. 1635, 1639-41 & nn. 2 & 6.

Thus, the majority appropriately discussed the notes submitted by the reporter in the course of his investigation which state: "strongly feel $ has changed hands instinctive feeling." And the majority implies that the result reached here would be reversed "had it been shown, by way of depositions, answers to interrogatories, admissions, or affidavits, that Pechous had told Fineman that his charge of bribery was prompted by 'instinct' alone and that he had no evidence to support it." Slip op. at 17.

The reporter, however, did answer interrogatories propounded by plaintiffs. Interrogatory No. 3(d) asked:

> "With reference to your talking with the said Robert C. Pechous regarding the awarding of said contract: State whether any tape recording, written memorandum or other record of such talk(s) was made by you. If so, produce a copy of each such recording, written memorandum or other record."

The reporter replied: "Yes—see notes attached." It is also significant that, in plaintiffs' petition for leave to appeal, the "instinctive feeling" quotation was cited and relied upon as a ground justifying the reversal of the appellate court's decision. The accuracy or the meaning of this quotation has never been challenged in this court by defendants Fineman and Field, despite numerous opportunities to do so. In oral argument, counsel for petitioners stated, while discussing whether defendants Fineman and Field had exercised caution in printing Pechous' quotation: "What more elementary precaution can there be than to have an individual who makes the charge himself admit to a reporter that he has no facts and say beyond that to the reporter as the record in this case demonstrates, that I have an instinctive feeling, I think money changed hands ***." Counsel for Pechous also quoted and relied upon the "instinctive feeling" quotation in argument. Counsel for defendants Fineman and Field never challenged the accuracy or meaning of the quotation. Even without this particular quotation, however, I think it is clear from Pechous' reported comments (see the appendix) that Pechous' "charge" was a suspicious inference and that he accurately communicated the state of his own knowledge to the reporter. If the facts Pechous had were insufficient to shield him from liability, those same considerations should operate against granting Fineman's and Field's motion for summary judgment.

The reporter had plenty of time to compose his story and a perspective of several months which was unavailable to participants at the January meeting, like Pechous and members of the audience who, according to one of the aldermen, yelled "payoff" as the contract was voted upon. He had Pechous' information and had obtained the exculpatory explanations of the aldermen. He made an investi-

gation and found no evidence cash payoffs had been made. He then transformed Pechous' statement into the hard factual charge of payoffs. Moreover, he could have written the article without quoting Pechous' "30 pieces of silver" statement. The gist of the controversy could have been repeated without it. In my view, therefore, the evidence does not justify holding Pechous liable while exonerating defendants Fineman and Field.

Thus far I have accepted, *arguendo*, the majority's determination that the actual-malice standard had to be applied. If this court purports to apply that standard, it should be correctly applied.

There is some merit, however, in applying a fair-comment privilege to Pechous' remarks and to the reporting of those remarks.

The fair-comment privilege has been recognized by the United States Supreme Court (see *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 292 n.30, 11 L. Ed. 2d 686, 713 n.30, 84 S. Ct. 710, 732 n.30), although the extent of the privilege has never been defined. In *Greenbelt Cooperative Publishing Association v. Bresler* (1970), 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 2537, however, the court decided that a newspaper's accurate report of tumultuous city council meetings in which several speakers characterized a prominent local builder's negotiating position as blackmail was not actionable defamation. The basis for the charge of blackmail was clearly set forth in the article; consequently it was unreasonable to conclude that the word "blackmail" constituted anything other than "a vigorous epithet used by those who considered [the builder's] negotiating position extremely unreasonable." (398 U.S. 6, 14, 26 L. Ed. 2d 6, 15, 90 S. Ct. 1537, 1542.) And in *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997, the court distinguished opinions and ideas, incapable of being proved false and therefore nonactionable, from actionable false statements of fact. The former, said the court, depend on the competition of other ideas for their correction, while the latter do not advance society's interest in robust

debate. 418 U.S. 323, 339-40, 41 L. Ed. 2d 789, 805, 94 S. Ct. 2997, 3007. See also *Old Dominion Branch No. 496 v. Austin* (1974), 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770.

Since the persons allegedly defamed here were public officials and since the comments made concerned a matter of public significance, we would not in this case have to decide the extent of protection afforded to opinions concerning private individuals or private matters. See *Pfister v. Milwaukee Free Press Co.* (1909), 139 Wis. 627, 640, 121 N.W. 938, 944; Hill, *Defamation and Privacy Under the First Amendment,* 76 Colum. L. Rev. 1205, 1229 n.113 (1976).

The majority here holds that Pechous' comments, because they supposedly impute bribery, cannot be considered an opinion because it is not " 'rhetorical hyperbole' " and because it informed the audience that a criminal act "of which the audience was unaware" had been committed. (Slip op. at 11.) I do not think, however, that the audience believed Pechous had more information than it did. (*Cf.* Restatement of Torts (Second) sec. 566, comment *c* (1977).) Pechous' remarks were suspicious inferences, stated and understood as such, and based upon public information. The members of the public who heard or read Pechous' remarks were fully able to make up their own minds on the issue, and they could conclude either that Pechous had defamed himself by making an unwarranted inference or that his suspicion reflected and represented their own views. The majority has unwisely chosen to assume that the categories of fact and opinion are mutually exclusive (*cf.* Restatement of Torts sec. 566, comment *b* (1977)), ignoring the role of the tentative hypothesis and the inferential comment in public discourse. People do not communicate solely by asserting conclusions about which they are completely certain, and people are not understood in such a fashion. The majority opinion would logically encompass mere questions which indicate that the questioner is suspicious.

Inferential comments concerning political issues and public figures can have great value to the political process. An evaluation of known or available facts may spark the production of additional information through the investigatory actions of others and additional discussion by those seeking to implement a particular program. Pechous' comments in this case did spark such activity.

In this case, moreover, the defendants were public officials. Public officials generally have access to the media (*Troman v. Wood* (1976), 62 Ill. 2d 184, 193); hence not only is the factual predicate known, permitting the public to reach its own conclusions (about the speaker as well as the plaintiffs), but it is likely that the competing inferences will be heard. Here, the media reported in the same article the countercharges of the aldermen, to wit, that Pechous' statements were motivated by political ambition and partisanship, and their defense of the merits of the private-scavenger-service contract. This access to the marketplace of ideas distinguishes this situation from those in which an authoritative pronouncement that a particular statement was false (*Troman v. Wood* (1976), 62 Ill. 2d 184, 195) is desirable.

There may be instances in which the fair-comment privilege should be defeated: (1) if an expression implies that the speaker is aware of defamatory facts unknown to his listeners or readers (compare Restatement (Second) of Torts sec. 566, comment *c*, illustration 4 (1977), with Restatement (Second) of Torts sec. 566, comment *c*, illustration 5 (1977)); and (2) if the source of the defamatory inference conceals, with actual malice, facts which would tend to negate the inference. (See *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975; *Cianci v. New Times* (2d Cir. July 11, 1980), 49 U.S.L.W. 2070.) In both situations, the public is prevented from making up its own mind on the issues and the courts should intervene to assure a fair public debate.

The problem with restricting the fair-comment privilege to hyperbolic, loose or figurative statements is that the privilege will only protect those who defame in

ambiguous language. (This same criticism is made of the innocent-construction rule.) All critics may not be so crafty. And certainly the difficulty of determining which comments have a meaning enabling their verification (compare the majority opinion in *Old Dominion Branch No. 496 v. Austin* (1974), 418 U.S. 264, 282-86, 41 L. Ed. 2d 745, 761-63, 94 S. Ct. 2770, 2780-82, with the dissent (418 U.S. 264, 296-97, 41 L. Ed. 2d 745, 768-69, 94 S. Ct. 2770, 2787 (Powell, J., dissenting))—the inquiry necessary to determine, under the majority's approach, whether a statement constitutes a fact rather than an opinion—may be more difficult than deciding the scope of the privilege under the approach I would take, especially in view of constant changes in word usage. See Yankwich, *Recent Developments in the Law of Creation, Expression, and Communication of Ideas*, 48 Nw. U.L. Rev. 543, 544-51 (1953), *contra*, Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1233-59 (1976).

In sum, then, I am persuaded that the fair-comment privilege, a privilege with ancient roots in this State (see *Hahnemannian Life Insurance Co. v. Beebe* (1868), 48 Ill. 87), and which represents the trend of the constitutional common law of defamation, is applicable here. If I am wrong on this point, however, and if the acutal-malice standard should be applied, then I am persuaded that the majority opinion has incorrectly applied the standard. Under this standard, defendant Pechous is either entitled to a trial or summary judgment. Defendants Fineman and Field are not entitled to summary judgment, under this standard, and their case should be remanded for trial.

APPENDIX C

Second Division
12/19/78

No. 77-1472

JOSEPH G. CATALANO, et al.,
Plaintiffs-Appellants,

v.

ROBERT C. PECHOUS, et al.,
Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HONORABLE DANIEL P. COMAN, JUDGE PRESIDING.

Mr. JUSTICE DOWNING delivered the opinion of the court:

Plaintiffs, seven alderman of the city of Berwyn (Berwyn), Illinois, appeal an order of the circuit court of Cook County denying their motion for summary judgment and granting summary judgments in favor of defendant Robert C. Pechous and defendants Mark Fineman and Field Enterprises, Inc. Defendant Pechous's statements, made while serving as Berwyn's city clerk and quoted in an article written by Fineman and published by Field, form the basis of this libel suit. The only issue on appeal is whether the trial court erred in denying the plaintiffs' motion for summary judgment and in granting the defendants' motions. We affirm as to defendants Fineman and Field, and reverse and remand as to defendant Pechous.

Prior to January 1976, Berwyn had its garbage collected by city employees. On December 19, 1975, the plaintiffs as trustees of Berwyn voted to advertise for bids from private scavenger firms and to open the bids submitted on January 12, 1976. On December 29, 1975, several representatives from private scavenger firms attended the Berwyn Public Works Committee meeting. Following the adjournment of this meeting, the regular city council meeting was held. Of the representatives attending the Public Works Committee meeting, only

the three who had previously submitted bids remained for the regular council meeting. At this meeting the plaintiffs opened these firms' bids and accepted the lowest bid submitted by the Clearing Disposal Company (Clearing). The plaintiffs then voted to declare an emergency and create a $600,000 emergency appropriation for the private scavenger service. It was during this meeting that defendant Pechous first made the following allegedly libelous statement:

> "Two hundred and forty pieces of silver changed hands —thirty for each alderman."

The controversial nature of the award of the contract to Clearing is reflected in the actions taken by other city officials and bidders shortly thereafter. On January 5, 1976, Thomas Hett, the city attorney, sent the council a letter stating that its action in declaring an emergency was illegal and questioning the wisdom of the change to a private scavenger firm. On the same day, Emil Vacin, Berwyn's mayor, vetoed the award of the contract to Clearing in a letter, stating that he found the plaintiffs' actions at the December 29 meeting "questionable [and] patently unfair." The mayor's letter further questioned why all of the prospective bidders who were present at the Public Works Committee meeting had not been told to remain for the regular meeting. A second letter from Mayor Vacin to the plaintiffs vetoed the $600,000 appropriation. The plaintiffs' letter in response notified the mayor of their decision to override his veto. On January 12, 1976, Mayor Vacin returned the unsigned contract along with a letter reaffirming his veto on the ground that the contract was not in the best interest of the city.

The results of a survey of Berwyn residents favoring the retention of the city employees for garbage collection were sent to the mayor and to the plaintiffs by the Public Works Committee. The city employees charged that the plaintiffs' actions violated their collective bargaining agreement. One of the private scavenger firms planning to submit a bid by the

original January 12 deadline notified the city of its intention to bring suit to have the December 29 bidding declared illegal. Ultimately, the circuit court threw out the December 29 bids and ordered the plaintiffs to readvertise.

Defendant Fineman began his investigation of the Clearing contract early in April 1976. During the course of his investigation, he reviewed the foregoing letters and documents, the minutes of the relevant meetings, and the contract. Before writing the article, defendant Fineman talked to the following people: John Van Tholen, Jr., a former Berwyn employee who had spoken in favor of the change to a private service and who had been employed by Waste Management, Inc. (WMI), the parent company of Clearing, within a month of the award of the contract; John DeBoer, the Clearing representative at the December 29 meeting; Joseph Sevick, whose occupation is not of record; Don Redicliffe, a WMI employee; Mayor Emil Vacin; a source whose name remains unknown; and a number of other persons as part of his general investigation of suburban garbage pick-up services.

Defendant Fineman first spoke with defendant Pechous early in April. During the conversation, defendant Pechous made the following statements which were late quoted in the article:

> "Something smells in this contract more than garbage. * * * I said at the council meeting when the contract was first awarded that I think 240 pieces of silver changed hands—30 for each alderman. * * * There was just something suspicious about the way that contract was approved. * * * I've said all along that if it were ever discovered how that contract was really approved, there'd be some vacant chairs in the city council. * * * There are just too many unanswered questions in the contract. The whole thing was railroaded through, and we can't help but think there was some stronger motivation behind it."

Defendant Fineman's article entitled "Berwyn Trash Pact Raises Stink/Berwyn Garbage Agreement Raises Stink" ap-

peared in the May 12-13, 1976 edition of *Suburban Week*, a weekly supplement to the then Chicago Daily News and the Chicago Sun-Times published by defendant Field.

Defendant Fineman reported that the plaintiffs had vehemently denied having taken payoffs, each claiming that defendant Pechous's statements were politically motivated insofar as Pechous was the democratic candidate for state representative and all but one of the plaintiffs were republicans. Fineman further reported John Van Tholen, Jr.'s support of the Clearing contract, his appointment as Berwyn streets superintendent, the nullification of that appointment, and his subsequent employment by WMI. The article further stated that an inside industry source claimed that Van Tholen had been given the WMI job "as a reward for having made sure the Berwyn contract was given to Clearing." However, Fineman quoted Van Tholen's denial of these charges, and also reported the plaintiffs' denials that Van Tholen had influenced their decision in awarding the contract.

Fineman's article then reviewed the bids opened at the December 29 meeting. These bids were from C. Groot Automatic Disposal Company, Van Der Molen Disposal Company, and Clearing, and were $3.55, $3.20, and $3.15 per month per family respectively. Based on the Securities and Exchange Commission documents that he had reviewed, Fineman reported that the C. Groot Company was owned by John C. Groot, a WMI stockholder and one of WMI's eight founders. The article stated that a WMI spokesman had confirmed that Groot was one of its stockholders but had denied any connection between the two firms. However, Fineman also reported an inside industry source's claim that the Groot bid was never intended to be competitive with Clearing's bid.

In conclusion Fineman reported that the December 29 bids were thrown out and the plaintiffs ordered to readvertise for bids by Circuit Court Judge Francis Delaney. Reportedly this action was taken in response to suits filed against the plaintiffs by the Berwyn democratic administration officials and a private

scavenger firm. Fineman went on to note that Clearing's second bid was still the lowest and that it had again been awarded the contract in February. However, the article continued stating that some Berwyn officials were considering turning over information on the award of the first contract to federal authorities.

On June 28, 1976, plaintiffs filed a three count libel complaint. Count I alleged that defendant Pechous's "240 pieces of silver" statement made at the council meeting and his other statements made to defendant Fineman were intended to lead his listeners to believe that the plaintiffs were bribed to vote for the contract or that they voted for personal gain in violation of their fiduciary duties of office. Plaintiffs further alleged that these statements were understood in that manner, were false, and were uttered with malice. Count II iterated the allegations of Count I, alleged that malice was the gist of the action, and sought punitive damages. Count III alleged that defendants Fineman and Field's article contained statements that accused the plaintiffs of taking bribes (Pechous's statements), attributed the employment of Van Tholen to the plaintiffs' illegal and improper action, and charged plaintiffs with further "suspicious" and illegal behavior. Count III further alleged that these accusations and implications were false and that the article was written and published knowing that such statements were false or with reckless disregard of their truth or falsity.

The defendants' answers admitted making the statements and publishing the article but denied all other allegations. Defendants Fineman and Field also asserted as affirmative defenses that the article was published about public officials and was not published with knowledge of its falsity or probable falsity; that the article was devoted to the public interest; and that defendant Pechous's statements in the article were made at the Berwyn council meeting, and therefore the publication of these statements could not form the basis of a libel action against them.

On October 26, 1976, defendants Fineman and Field moved for summary judgment reasserting the foregoing privileges and contending that defendant Pechous's "240 pieces of silver" statement was an expression of opinion, and that all of the quoted statements were capable of an innocent construction. Defendant Fineman's affidavit stated that he did not believe any statements in the article were false.

On May 31, 1977, the plaintiffs responded to this motion and filed a cross-motion for summary judgment. The plaintiffs contended that the article and the statements of defendant Pechous were incapable of an innocent construction and that the article was not privileged because: (1) defendant Pechous's statements were made in his private capacity and were reported by the defendants three months after the fact, and (2) the constitutional privilege applies only to reports of the actions of public officials in the performance of their public duties and does not apply even then when the statements are libelous per se. The plaintiffs' cross-motion was supported by the affidavit of one of the plaintiffs, stating generally that defendant Pechous had no part to play in awarding the contract. The affidavits of three other plaintiffs filed on June 9, 1977 generally rebutted defendant Fineman's statement that he did not believe any of the statements to be untrue and stated that they believed that the article was published with reckless disregard of whether the statements within it were true or false.

On the basis of these pleadings, and defendant Fineman's answers to interrogatories, investigatory documents, and notes, the trial court granted summary judgment for defendants Fineman and Field on June 9, 1977. The court found that defendant Pechous's statements did not fall within the scope of *Lulay* v. *Peoria Journal-Star, Inc.* (1966), 34 Ill. 2d 112, 214 N. E. 2d 746 (reports of governmental acts and utterances), or *Blair* v. *Walker* (1976), 64 Ill. 2d 1, 349 N. E. 385 (executive privilege), and that there was a question of fact as to whether the article was published with actual malice as defined in *New*

York Times v. *Sullivan* (1964), 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686. However, the trial court also found that the application of the innocent construction rule of *John* v. *Tribune Co.* (1962), 24 Ill. 2d 437, 181 N. E. 2d 105, *cert. denied* 371 U.S. 877, rendered the statements in the article nonactionable. Accordingly, the court dismissed the action against defendants Fineman and Field and denied the plaintiffs' cross-motion.

On July 18, 1977, defendant Pechous also moved for summary judgment on the grounds that his "240 pieces of silver" statement was an assertion of opinion, that this and the other statements published in the article were capable of an innocent construction, and even if libelous, were privileged under the holdings of *New York Times, supra,* and *Blair, supra.* Defendant Pechous's affidavit stated that he did not act with malice in making the comments, and that as city clerk he had exercised his constitutional right to inform the Berwyn residents of his opinion of the plaintiffs' actions.

The plaintiffs again filed a cross-motion for summary judgment asserting that defendant Pechous's statements were incapable of an innocent construction, were not privileged under *Blair, supra,* or under *Lulay, supra,* and were made with actual malice. Plaintiff Myrtle D. Slawko's affidavit stated that defendant Pechous had no part to play in awarding the contract and that his statements were untrue.

On September 22, 1977, the trial court granted summary judgment for defendant Pechous and denied the plaintiffs' cross-motion. In so doing, the court found that the defendant's statements did not fall within the scope of the executive privilege cases, but that they were capable of an innocent construction.

It is from these findings and rulings that the plaintiffs appeal.

I.

We first consider the decision as to defendant Pechous. Plaintiffs challenge all of defendant Pechous's statements

quoted in the *Suburban Week* article. However, the plaintiffs' arguments in their briefs and at oral argument before this court were directed to his "240 pieces of silver" statement. For these reasons, we will consider only whether this statement is libelous per se, not privileged, and was made with actual malice.

A.

At the outset, we note that the plaintiffs label this statement as being libelous per se. Technically, since this was an oral statement it should be characterized as being slanderous. (See *Ward* v. *Forest Preserve District* (2nd Dist. 1957), 13 Ill. App. 2d 257, 261, 141 N. E. 2d 753.) However, although slanderous words are generally actionable only upon a proper averment of special damages (*Mitchell* v. *Tribune Co.* (1st Dist. 1951), 343 Ill. App. 446, 447, 99 N. E. 2d 397, *cert. denied* 342 U. S. 919), if such words may be fit into the categories of libel per se, damages are presumed. Those classes of words held to be libelous per se are as follows: (1) those imputing the commission of a criminal offense; (2) infection with a communicable disease of any kind which, if true, would tend to exclude one from society; (3) the inability to perform or want of integrity in the discharge of duties of office or employment; and (4) those prejudicing a particular party in his profession or trade. *Coursey* v. *Greater Niles Tp. Publ. Corp.* (1st Dist. 1967), 82 Ill. App. 2d 76, 81-82, 227 N. E. 2d 164, *aff'd* 40 Ill. 2d 257, 239 N. E. 2d 837.

The plaintiffs contend that defendant Pechous's "240 pieces of silver" statement falls within the first, third, and fourth categories. However, defendant Pechous argues that this statement is:

> "[S]ymbolic speech which does not necessarily impute the taking of a bribe but more commonly implies only the betrayal of trust. The aldermen could be viewed as having generally betrayed their public trust, as Judas betrayed Christ's trust * * * ."

Thus, the defendant relies on the innocent construction rule which holds that words allegedly libelous must be read as a whole and in their best possible sense, and if they are capable of an innocent construction, they must be declared nonactionable at law. (*Jacobs* v. *Gasoline Retailers' Ass'n.* (1st Dist. 1975), 28 Ill. App. 3d 7, 10, 328 N.E.2d 187.) We disagree with the trial court's acceptance of the defendant's innocent construction.

In determining whether words are libelous per se, they must be taken in the sense which listeners and readers of common and reasonable understanding would attribute to them. (*Lorrillard* v. *Field Enterprises, Inc.* (1st Dist. 1965), 65 Ill. App. 2d 65, 72, 213 N.E.2d 1.) To constitute libel per se, the offensive accusation need not state the commission of a crime in terms of art or with the particularity of an indictment. (*Zeinfeld* v. *Hayes Freight Lines, Inc.* (1968), 41 Ill. 2d 345, 348, 243 N.E.2d 217.) The question whether the words complained of are libelous per se is for the court to determine. (*Brewer* v. *Hearst Pub. Co.* (7th Cir. 1950), 185 F. 2d 846, 849.) There is no general rule defining what words are defamatory and, therefore, each case depends on its own facts. *Korbar* v. *Hite* (1st Dist. 1976), 43 Ill. App. 3d 636, 639, 357 N.E.2d 135, *cert. denied* 434 U.S. 837.

In construing the meaning of defendant Pechous's statement that "240 pieces of silver changed hands—30 for each alderman" in its most natural and obvious sense, we do not see how this statement can be given an innocent construction. (See *Welch* v. *Chicago Tribune Co.* (1st Dist. 1975), 34 Ill. App. 3d 1046, 1053, 340 N. E. 2d 539; *Coursey* v. *Greater Niles Tp. Pub. Corp.* (1st Dist. 1967), 82 Ill. App. 2d 76, 82, 227 N. E. 2d 164, *aff'd* 40 Ill. 2d 257, 239 N. E. 2d 837.) Although this statement does not charge the crimes of bribery or official misconduct (Ill. Rev. Stat. 1977, ch. 38, pars. 33-1, 33-3) with the particularity of an indictment, the inference raised is clear. Moreover, reading this statement in its "best possible sense" (*Jacobs, supra*) and ascribing only the defendant's "betrayal of public

trust" meaning to it, we find that its impugnment of the plaintiffs' integrity in the discharge of their official duties and the concomitant prejudice to their professions is sufficient to sustain the plaintiffs' charge of libel per se (see *Weber* v. *Woods* (1st Dist. 1975), 31 Ill. App. 3d 122, 128, 334 N. E. 2d 857).

Since an innocent reading is not plausible, summary judgment for the defendant on this ground was improper. However, since the plaintiffs appeal the denial of their motion for summary judgment, it remains to be determined whether, even though libelous, defendant Pechous's statement was privileged.

B.

Defendant Pechous argues that his "240 pieces of silver" statement was absolutely privileged as made in the course of the proceedings of public officials (*Blair, supra*) and constitutionally privileged as the report of the conduct of public officials. He also asserts that this statement is nonactionable insofar as it was a statement of opinion made without malice in exercising his constitutional right to comment on the plaintiffs' actions. We disagree.

Defendant Pechous asserts that his responsibility to countersign all warrants drawn upon the municipal treasurer (Ill. Rev. Stat. 1977, ch. 24, par. 8-1-8), the prohibition against the abolishment of his office, the alteration of his term, or the manner of his selection without referendum (Ill. Const. 1970, art. VII, sec. 6(f)), and his position as Berwyn's city clerk denote an elected position of high rank comparable to the positions of those officials given absolute immunity in *Blair* v. *Walker* (1976), 64 Ill. 2d 1, 349 N. E. 2d 385 (governor), *Loniello* v. *Fitzgerald* (1st Dist. 1976), 42 Ill. App. 3d 900, 356 N. E. 2d 842 (mayor), and *Larson* v. *Doner* (2nd Dist. 1961), 32 Ill. App. 2d 471, 178 N. E. 2d 399 (city commissioners). Although we recognize that a city clerk is considered an officer in a city's form of government (*Paglini* v. *Police Board* (1975),

61 Ill. 2d 233, 236-237, 335 N. E. 2d 480), we are of the opinion that defendant Pechous has failed to show that his statement was "legitimately related to matters committed to his responsibility" (*Blair, supra* at 10).

Defendant Pechous asserts that his participation in the deliberations leading up to the award of the contract, his authority to sign the contract, and his position as an elected official lend credence to the proposition that his duties were not merely ministerial, and that therefore his statement related to subject matter over which he had direct responsibility and authority. Pechous refers us to no authority which gives the city clerk the right or duty to speak out in matters over which he has no authority to cast a decisive vote in the city council. Pechous refers us to no statute or ordinance granting him the authority to sign such contracts. On the contrary, the Berwyn City Code provides that "all contracts exceeding in amount the sum of five hundred dollars * * * shall be let by the commissioner of public works, with the approval of the city council * * *." Berwyn City Code, sec. 2-97.

Finally, plaintiff Myrtle D. Slawko's affidavit stated that the defendant had no part to play in the awarding of the contract. In response, defendant Pechous's affidavit merely states that he "was the duly elected qualified and acting City Clerk * * * and was obliged to keep all City Records, documents and journal[s] of council meetings * * * to make available the public records in his keeping." Pechous's affidavit not only fails to refute the plaintiff's averment that he had no responsibility over the actions of the council, but also it supports the plaintiffs' contention that his duties were merely ministerial. Strictly construing the plaintiff's affidavit (*Bd. of Education* v. *Green Valley Builders, Inc.* (2nd Dist. 1973), 10 Ill. App. 3d 235, 237, 293, N.E.2d 183) and liberally construing the defendant's (*American Nat. Bank & Trust Co.* v. *Lembessis* (1st Dist. 1969), 116 Ill. App. 2d 5, 10, 253 N.E.2d 126), we find that Pechous failed to deny that his duties were only ministerial and

unrelated to the discretionary award of the contract and is therefore deemed to have admitted the truth of those averments (*Watson* v. *Southwest Messenger Press* (1st Dist. 1973), 12 Ill. App. 3d 968, 972, 299 N.E.2d 409). Since his statement related wholly to activities and responsibilities of persons over whom he had no authority and for whose activities he had no responsibility, we agree with the trial court's finding that defendant Pechous's "240 pieces of silver" statement does not fall within the scope of the executive privilege cases.

Secondly, defendant Pechous contends that his statement was conditionally privileged as fair comment and criticism on a matter of public interest, and that the plaintiffs have failed to prove his maliciousness to defeat this privilege. Since we find this privilege inapplicable, it is unnecessary for us to determine whether it was defeated.

Four criteria must be met in order that fair comment be deemed not actionable: (1) the publication must be of an opinion, (2) it must relate not to an individual but to his acts, (3) it must be fair in the sense that the reader can see a factual basis for comment and draw his own conclusions, and (4) it must relate to a matter of public interest. (*Brewer* v. *Hearst Pub. Co.* (7th Cir. 1950), 185 F. 2d 846, 850.) Whether these criteria are met may be determined as a matter of law. *Hahnemannian Life Ins. Co.* v. *Beebe* (1868), 48 Ill. 87.

We recognize that a writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it might be. (*Hotchner* v. *Castillo-Puche* (2d Cir. 1977), 551 F. 2d 910, 913.) However, although the boundary line between fact and opinion is not a precise one (*Buckley* v. *Littell* (2d Cir. 1976), 539 F. 2d 882, 883), we disagree with the defendant's contention that his "240 pieces of silver" statement represents merely an opinion.

In *Buckley* v. *Littell* (2d Cir. 1976), 539 F. 2d 882, the court construed the defendant's statement that, "Like West-

brook Pegler, who lied day after day * * * about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and nothing else to do" as an assertion of fact relating to Buckley's journalistic ability. In so finding, the court stated that:

> "Regardless of what other implicit but unelaborated comparisons Littell was attempting to draw between Buckley and Pegler, and regardless of whether he was attempting to say that Buckley lied about individuals precisely in the same way that Pegler did, * * * it seems to us that this third remark as it appears on its face states that Buckley was engaging in libelous journalism." (*Buckley, supra* at 896.)

Similarly, defendant Pechous's comparison of the plaintiffs' actions to Judas' betrayal of Christ's trust and his acceptance of money is clear. Regardless of whether the defendant was attempting to say that the plaintiffs literally received pieces of silver in the same way Judas did, the factual nature of this statement is apparent in the direct correlation between the number of pieces of silver and the number of aldermen on the council at the time the contract was awarded.

Even assuming that this statement was merely one of opinion, liability for libel may attach when a negative characterization of a person is coupled with a clear but false implication that he was privy to facts about the plaintiffs and their actions. *Hotchner* v. *Castillo-Puche* (2d Cir. 1977), 551 F. 2d 910, 913.

For the foregoing reasons, we find that defendant Pechous made a factual charge that the plaintiffs had been bribed to award the contract to Clearing. As such, the defendant's "240 pieces of silver" statement does not constitute fair comment or criticism and is not privileged.

Furthermore, we are of the opinion that the plaintiffs have shown that defendant Pechous made his "240 pieces of silver"

statement with actual malice, *i.e.,* with reckless disregard of whether it was true or false.

The United States Supreme Court has held that actual malice may be inferred when the investigation for a story which is not "hot news" is grossly inadequate in the circumstances. (*Curtis Publishing Co.* v. *Butts* (1967), 388 U. S. 130, 156-58, 87 S. Ct. 1975, 18 L. Ed. 2d 1094.) In this case, defendant Pechous's answers to interrogatories indicate that he made no formal investigation of the circumstances surrounding the award of the contract. Defendant Pechous merely stated that the minutes from the December 29 meeting indicated a substantial deviation from prescribed municipal contracting procedures.

Furthermore, when questioned as to his personal knowledge and the factual basis for his "240 peices of silver" statement, defendant Pechous referred to the documents and letters complied during defendants Fineman and Field's investigation. The first of these documents charging that the plaintiffs' actions were irregular was dated January 5, 1976. Therefore, at the time defendant Pechous charged the plaintiffs with having taken bribes at the December 29 meeting, he did so solely on the basis of his unsupported opinion that the proceedings were irregular.[1]

There may have been many reasons for the alleged irregularity of the plaintiffs' actions at the December 29 meeting. As a ministerial officer, defendant Pechous would not necessarily have been privy to these reasons. Nevertheless, without any investigation, and without personal knowledge of facts to support his charge, defendant Pechous charged the plaintiffs with the serious crimes of bribery and official mis-

[1] With respect to the constitutional privilege of the *New York Times* v. *Sullivan, supra,* case, defendant Pechous's brief merely adopts by reference the arguments of defendants Fineman and Field. No attempt is made to explain why that case would protect Pechous when he initially made the statement at the council meeting.

conduct. We are of the opinion that defendant Pechous must have had a "high degree of awareness of [the] * * * probable falsity" of his statement (*Garrison* v. *Louisiana* (1964), 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125), and that therefore he made the statement with reckless disregard of whether it was true or false. In our opinion the record does not support the claim of privilege asserted by defendant Pechous.

II.

Defendant Pechous's "240 pieces of silver" statement retained its unambiguous libelous meaning in the article written and published by defendants Fineman and Field. Therefore, we find that the trial court erred in granting these defendants' motion for summary judgment on the ground that the article could be innocently construed. However, we are not bound by the precise reasons given by the trial court in entering judgment. (*Weber* v. *Woods* (1st Dist. 1975), 31 Ill. App. 3d 122, 132, 334 N. E. 2d 857.) Upon a consideration of the whole record (*Gliwa* v. *Washington Polish Loan & Bldg. Ass'n.* (1st Dist. 1941), 310 Ill. App. 465, 471, 34 N. E. 2d 736), we agree with the defendants' contention that their article was privileged as a report of the official conduct of public officials and that the plaintiffs have failed to defeat this privilege. Therefore, despite our disposition of the case as to defendant Pechous, we find that summary judgment was properly granted in favor of defendants Fineman and Field. See *Weber, supra* at 131.

In applying constitutional principles to the common law of libel, the United States Supreme Court held that public officials may recover civil damages in libel actions only when they can establish by "clear and convincing evidence" that the libel was made "with knowledge that it was false or with reckless disregard of whether it was false or not." (*New York Times Co.* v. *Sullivan* (1964), 376 U. S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686; *Gertz* v. *Robert Welch, Inc.* (1974), 418 U. S. 323, 342, 94 S. Ct. 2997, 41 L. Ed. 2d 789.) The plaintiffs do not

dispute that they are "public officials" within the meaning of *Rosenblatt* v. *Baer* (1966), 383 U. S. 75, 85, 86 S. Ct. 669, L. Ed. 2d 597. Therefore, the only question is whether in the materials before the trial judge in connection with the defendants' motion for summary judgment, there was a genuine issue of fact as to the existence of actual malice, *i.e.*, knowledge of the falsity of defendant Pechous's statements in the article or reckless disregard for the truck or falsity of these statements. The trial court found that there was. We disagree.

A defendant in a defamation action brought by a public official cannot automatically insure a favorable verdict by testifying that he published with a belief that the statements were true, and the question of whether publication was made in good faith without knowledge of falsity or in reckless disregard of truth or falsity is generally a question for the jury. (*Durso* v. *Lyle Stuart, Inc.* (1st Dist. 1975), 33 Ill. App. 3d 300, 306, 337 N.E.2d 443; *St. Amant* v. *Thompson* (1968), 390 U. S. 727, 732, 88 S. Ct. 1323, 20 L. Ed. 2d 262.) However, in *Allen* v. *Meyer* (1958), 14 Ill. 2d 284, 292, 152 N.E.2d 576, it was held that:

> "In the instant case both parties moved for summary judgment and thereby the court was invited to decide the issues by reference to its file. It is clear that all material facts were before the court; the issues were defined; and the parties were agreed that only a question of law was involved. In this view, the parties were correct and the entry of summary decree for one or the other was proper."

To determine whether the statements were published with the requisite actual malice, we must look to the defendants' subjective state of mind. (*St. Amant, supra* at 731.) The Supreme Court's ruling in *St. Amant* that a false statement charging criminal conduct by a public official did not constitute publication with "reckless disregard" despite the fact that the writer lacked personal knowledge of the plaintiff's activities, relied on the affidavit of a person whose reputation for veracity

was unknown, and failed to check the allegations with persons who might have known facts indicates that only egregious conduct by the defendant will constitute "reckless disregard" for the truth. As in *St. Amant,* the plaintiffs have failed to meet their constitutionally imposed burden of proof.

The plaintiffs first stress the alleged falsity of defendant Pechous's statements published by defendants' Fineman and Field. However, whether the statements in the article were true or false is not the issue to be resolved by this court. (*Bon Air Hotel, Inc.* v. *Time, Inc.* (5th Cir. 1970), 426 F. 2d 858, 867.) The issue is whether the plaintiffs presented "sufficient evidence to permit the conclusion that the defendant[s] in fact entertained serious doubts as to the truth of [their] publication." (*St. Amant, supra* at 731.) We find that the plaintiffs presented no such evidence as to these defendants. On the contrary, as indicated in the facts, the defendants supplied the trial court with voluminous evidence establishing that they had fully investigated the circumstances surrounding defendant Pechous's charges and that their decision to publish the article was circumspect.

We also find unpersuasive the plaintiffs' assertion that their denial of taking payoffs created serious doubts as to the truth of defendant Pechous's statements. In *Edwards* v. *National Audubon Society, Inc.* (2nd Cir. 1977), 556 F. 2d 113, 121, *cert. denied* 46 U.S.L.W. 3386, the court stated:

> "surely liability under the 'clear and convincing proof' standard of *New York Times* v. *Sullivan* cannot be predicated on mere denials, however, vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error."[2]

---

[2] In *Dickey* v. *CBS,* 47 U.S.L.W. 2184-85 (9/26/78), the United States Supreme Court rejected the *Edwards* neutral reporting privilege which allowed publishers to print newsworthy statements even with serious doubts as to their truth as being inconsistent with the holding of *St. Amant* v. *Thompson* (1968), 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262. However, this left unaffected the *Edwards* court's discussion of actual malice under the *New York Times* privilege.

In view of the controversial nature of the plaintiffs' actions in awarding the refuse collection contract which was uncovered by defendants' Fineman and Field's investigation, we find that these defendants' acceptance of defendant Pechous's statements without serious doubt as to their truthfulness was warranted and did not constitute the egregious conduct necessary to establish actual malice.

For the foregoing reasons, we find the article privileged under *New York Times* v. *Sullivan* (1964), 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, and find it unnecessary to address the other privileges asserted by these defendants.

III.

We reverse the trial court's grant of summary judgment for defendant Pechous and its denial of the plaintiffs' motion for summary judgment as to defendant Pechous and remand the cause to the circuit court of Cook County for further proceedings consistent with the views expressed herein. We affirm the trial court's grant of summary judgment for defendants Fineman and Field.

Affirmed in part; reversed and remanded in part.

STAMOS, P.J., and PERLIN, J., concur.

Second Division
March 20, 1979

No. 77-1472

JOSEPH G. CATALANO, et al.,
Plaintiffs-Appellants,

v.

ROBERT C. PECHOUS, et al.,
Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HONORABLE DANIEL P. COMAN, JUDGE PRESIDING.

SUPPLEMENTAL OPINION UPON DENIAL OF REHEARING

Mr. JUSTICE DOWNING delivered the opinion of the court:

Petitions for rehearing were filed by plaintiffs and defendant Pechous. All parties filed responses pursuant to court order. Defendant Pechous also, on January 9, 1979, filed a motion for leave to file an affidavit of Thomas P. Hardy and a certain ordinance of the City of Berwyn.

Based on our review of the petitions, the responses, and the said motion, we deem it necessary to make the following comments in denying each petition for rehearing as well as the motion of defendant Pechous for additional filings.

Our opinion was issued on December 19, 1978. On December 29, 1978, plaintiffs filed a petition for rehearing. On January 9, 1979, defendant Pechous filed both the petition for rehearing and the aforesaid motion.

For the first time defendant Pechous specifically challenges the accuracy of the following quote appearing in defendants Fineman and Field's article which was the basis of plaintiffs' suit:

> "I said at the council meeting when the contract was first awarded that I think 240 pieces of silver changed hands—30 for each alderman."

The complaint charged that Pechous said on December 29, 1975: "Two hundred forty pieces of silver changed hands —thirty for each alderman," to which defendant answered with a general denial.

Although it is undisputed that the contract was awarded to Clearing at the December 29, 1975 council meeting, defendant Pechous now, for the first time in the record, contends that he did not make this statement until the January 12, 1976 council meeting, and that he did not say "30 for each alderman."

In support of this argument, defendant Pechous filed the post-opinion motion in this court seeking leave to file the affidavit of Thomas P. Hardy, a reporter for the *Berwyn Life* newspaper who attended the council meeting and wrote an article concerning the January 12, 1976 council meeting. Hardy's affidavit states that defendant Pechous did not say "240 pieces of silver changed hands—30 for each alderman" at the January 12 meeting. Rather, Hardy's article, submitted in support of his affidavit, quotes defendant Pechous as follows:

> "He went on to say that '240 pieces of silver' cemented the relationship between Clearing and the aldermen, 'destroying the tap roots of deomcracy.'"

Although Supreme Court rule 366(a)(3) (Ill. Rev. Stat. 1977, ch. 110, par. 366(a)(3)) permits this court to amend the record by correcting errors or by adding matters that should have been included, it is axiomatic that new evidence not offered during the trial of a cause cannot be introduced for the first time on appeal (*Tobler Trucking Co.* v. *Industrial Com.* (1967), 37 Ill. 2d 341, 344, 226 N.E.2d 601; *Kohler* v. *Central & Southern Truck Lines* (5th Dist. 1977), 45 Ill. App. 3d 621, 626, 360 N.E.2d 89). Moreover, "no application for amendment of pleadings or process will be considered if made after the cause has been submitted for decision." (Ill. Rev. Stat. 1977, ch. 110A, par. 362.) Defendant Pechous did not submit the Hardy affidavit or article to this court until long after the case had been submitted for our decision. In fact, they were not

submitted until after the opinion had been issued. It is obvious that the material could have been available to defendant Pechous during the course of the trial, during the preparation of the appeal, and prior to oral argument in this court.

Nor do we believe that this new evidence falls within the rule permitting rehearing only on "points claimed to have been overlooked or misapprehended by [this] court" in its original opinion. (Ill. Rev. Stat. 1977, ch. 110A, par. 367(b).) This evidence was overlooked by defendant Pechous, not the court.

As noted in our opinion, the parties' cross-motions for summary judgment invited the trial court to decide the issues by reference to its file. It was the parties' position that all material facts were before the trial court, the issues were defined, and it was agreed that only a question of law was involved. (*Allen* v. *Meyer* (1958), 14 Ill. 2d 284, 292, 152 N. E. 2d 576). Referring to its file, the trial court found (1) the defendant's pro se answer generally denying all of the plaintiffs' allegations; (2) Fineman's answers to the plaintiffs' interrogatories stating that Pechous had told him, "I said at the council meeting when the contract was first awarded that 240 pieces of silver changed hands—30 for each alderman"; (3) defendant Fineman's uncontradicted affidavit attesting to the accuracy of the quoted statement; and (4) defendant Pechous's own motion for summary judgment and supporting memoranda in which he incorporated the "240 pieces of silver—30 for each alderman" statement. At no time did defendant Pechous argue to the trial court that he had made the statement on January 12, 1976, and that he had not said "30 for each alderman."

Moreover, defendant Pechous's briefs submitted to this court contain numerous references to the statement as quoted by defendants Fineman and Field, *i.e.*, "240 pieces of silver—30 for each alderman." Furthermore, although the plaintiff's statement of facts asserted that defendant Pechous made the statement on December 29, 1975 as quoted in the article, defendant Pechous's nine-page restatement of the facts in his

brief never questioned this assertion. During oral argument before this court defendant Pechous did not question the accuracy of the quote, nor was the date challenged.

Supreme Court Rule 341(e)(7) provides in part that "points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." (Ill. Rev. Stat. 1977, ch. 110A, par. 341(e)(7).) Although this rule is not jurisdictional and may be overridden by the need for a just result and uniform body of precedent, as stated by our supreme court in *Hux* v. *Raben* (1967), 38 Ill. 2d 223, 225, 230 N. E. 2d 831:

> "There are limitations. '[A]n appellate court should not, and will not, consider different theories, or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial.' (Citations omitted.)"

Obviously, the matters in defendant Pechous's post-opinion motion could have, yes, should have been presented in the trial court or at the very latest before oral argument in this court.

Although defendant Pechous's *pro se* answer generally denying all of the plaintiffs' allegations put the date and content of the quoted statement in issue, his subsequent pleadings not only failed to challenge its accuracy as it appeared throughout the parties' pleadings, memoranda, and briefs, but also reiterated these alleged inaccuracies. It is our opinion that any alleged misapprehension of the date and content of the quoted statement can only be attributed to the defendant's course of conduct throughout this litigation and his failure to raise this issue prior to the submission of the case for our decision. Because we believe that the defendant's efforts to correct these alleged inaccuracies have come too late, we must consider the statement as quoted in the article to be accurate. See *People* v. *C. & A. R. R. Co.* (1911), 253 Ill. 191, 196-198, 97 N. E. 310.

In this same post-opinion motion, defendant Pechous also sought to amend the record to include those portions of the

Berwyn City Code which create and define the duties of the Board of Health of that city. His petition for rehearing argues that as a member of the Board of Health at the time he made the statement, his statement was "legitimately related to matters committed to his responsibility" and therefore was privileged under *Blair* v. *Walker* (1976), 64 Ill. 2d 1, 349 N. E. 2d 395.

The defendant's motion to file these ordinances at this point in the litigation suffers from the same infirmities noted previously with respect to the Hardy affidavit and article. Moreover, even if we were to take judicial notice of these ordinances, we note that the defendant advances this new theory for the first time in his petition for rehearing. Under these circumstances, we think that it can hardly be said that the defendant's argument is grounded on a point which we misapprehended or overlooked. Furthermore, we find nothing in this theory which would aid defendant Pechous.

Petitions for rehearing denied; defendant Pechous's motion denied.

STAMOS, P. J., and PERLIN, J., concur.

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department Law Division

Catalano
v.
Pechous, et al.

No. 76 L 11793

ORDER

This matter coming before the Court on Defendants' Fineman and Field Enterprises, Inc. Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment and the Court having reviewed the briefs, documents and heard argument as to Count III of the Complaint and being fully advised in the premises:

HEREBY RULES and FINDS:

1. The statements by Defendant Pechous which appear in the article do not fall within the scope of *Ludsy* v. *Peoria Journal Star, Inc.,* 34 Ill.2d 112 and related cases or within the scope of *Blair* v. *Walker,* 64 Ill.2d 1 and related cases.

2. Their is a question of fact about whether Defendants Fineman and Field Enterprises, Inc. published the article in question with actual malice as defined in *New York Times Company* v. *Sullivan,* 376 U.S. 254 and related cases.

3. Application of the "innocent construction" rule of *John* v. *Tribune Co.,* 24 Ill.2d 437 renders the statements in the article non-actionable against Defendants Fineman and Field Enterprises, Inc.

WHEREFORE IT IS ORDERED:

1. Defendants Fineman and Field Enterprises, Inc. Motion for Summary Judgment is granted and the action dismissed as to those Defendants.

2. Plaintiff's Motion for Summary Judgment is denied.

3. The case remains pending as to Counts I and II which are directed to Defendant Pechous.

June 9, 1977

DON HILLIKER
Fineman and Field Enterprises
One First Nat'l Plaza
Chicago, Ill
786-7438

ENTER:

/s/ DANIEL P. COMAN
Daniel P. Coman
Judge

MORGAN M. FINLEY,
CLERK OF THE CIRCUIT COURT OF COOK COUNTY

APPENDIX E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department — Law Division

Jos. G. Catalano *et al.*,

v.

Robert C. Pechous *et al.*

No. 76 L 11793

ORDER

This matter coming on to be heard on Plaintiffs' motion for summary judgment and on Defendant Robert Pechous' cross-motion for summary judgment, the parties being present by counsel and the court having heard argument of counsel, the court finds:

1. The subject statements by Defendant Pechous do not come within the scope of "executive privilege" cases such as *Blair* v. *Walker,* 64 Ill. 2d 1 and *Loniello* v. *Fitzgerald,* 42 Ill. App. 3d 900.

2. The subject statements by Defendant Pechous come within the "innocent construction" rule of *John* v. *Tribune, Co.,* 24 Ill. 2d 437.

It is therefore ordered:

1. Plaintiffs' motion for summary judgment is denied.

2. Defendant, Robert Pechous, motion for summary judgment is granted.

3. Counts I and II are dismissed as to Defendant, Robert Pechous; and the case is dismissed with prejudice.

4. There is no just cause for delay of any appeal herein.

E. V. HANRAHAN
Attorney for Plaintiffs
69 Washington
Chicago, Illinois
263-2123

ENTER:

CIRCUIT COURT
JUDGE DANIEL P. COMAN
Judge

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

APPENDIX F

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

November 26, 1980

Mr. James E. Gierach
Attorney at Law
9500 S. 50th Court
Oak Lawn, IL 60453

Nos. 51912—Joseph G. Catalano; et al., appellants, vs. Robert
51931 C. Pechous, indv.; et al., etc., appellees. Appeal,
Cons. Appellate Court, First District.

The Supreme Court today denied the petitions for rehearing in the above entitled cause. The opinion was modified upon such denial and amended pages 12, 23 and 29 are enclosed. Please substitute these pages in the copy of the opinion which was previously forwarded to you.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX G

ILLINOIS APPELLATE COURT

First District

Joseph G. Catalano, et al., *Plaintiffs-Appellants,* v. Robert C. Pechous, et al., *Defendants-Appellees.*	No. 77-1472

ORDER

Plaintiffs-appellants filed a petition for rehearing. Defendant-appellee Pechous filed a petition for rehearing and a motion for leave to file the affidavit of Thomas P. Hardy and the general ordinances of the City of Berwyn.

In order to aid the court in considering the said petitions, it is hereby ordered that the following shall file memorandums with respect to the following petitions:

(1) Defendants Field and Fineman shall file, on or before February 2, 1979, a memorandum with respect to plaintiffs-appellants' petition.

(2) Defendant-appellee Pechous shall file, on or before February 2, 1979, a memorandum with respect to plaintiffs-appellants' petition.

(3) Plaintiffs-appellants shall file, on or before February 2, 1979, a memorandum with respect to defendant-appellee Pechous' petition and motion of January 9, 1978 to file an affidavit, etc.

JOHN J. STAMOS
John J. Stamos,
Presiding Justice

ROBERT J. DOWNING
Robert J. Downing,
Justice

MAURICE PERLIN,
Maurice Perlin,
Justice

DATED: January 18, 1979

APPENDIX H

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department Law Division

Joseph G. Catalano, et al.,
Plaintiffs,

vs.

Robert C. Pechous, et al.,
Defendants.

No. 76 L 11793

MEMORANDUM IN SUPPORT OF DEFENDANT ROBERT C. PECHOUS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

This cause of action was filed by Plaintiffs, all being incumbent aldermen of the City of Berwyn, against the then City Clerk of Berwyn, Robert C. Pechous, for alleged slanderous statements made by Defendant Pechous and reported by Defendant Fineman and published by Defendant Field Enterprises, Inc. in its May 12-13, 1976 edition of Suburban Week (Exhibit A attached).

Defendants Fineman and Field moved for Summary Judgment and this Court on June 9, 1977 granted said motion based on the "innocent construction" rule of *John* v. *Tribune Co.*, 24 Ill. 2d 437.

Defendant Robert C. Pechous submits that the "innocent construction" rule applies with equal force as to him and therefore Plaintiffs' Motion for Summary Judgment must be

denied and Defendant Pechous' Motion for Summary Judgment should be allowed.

Defendant Pechous further contends that his comments as a public official of Berwyn against other public officials of Berwyn concerning the elimination of public scavenger service and the substitution of private scavenger service, are protected fair, albeit caustic, criticism under the First Amendment. *New York Times* v. *Sullivan,* 376 U.S. 256, 270 (1963); *Edwards* v. *National Audubon Society* (Docket No. 77-7018, 7034 USCA 2nd Dist.). The national standard is ". . . that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." (*New York Times supra*). The statements of Pechous fall within that national standard.

II.

APPLICABLE LAW ON CONTRACT LETTING

A. Ill. Rev. Stats.: Ch. 24 Sec. 8-9-1

"In municipalities of less than 500,000, except as otherwise provided in Articles 4 and 5[1] *any work or other public improvement* which is not to be paid for in whole or in part by special assessment or special taxation, when the expense thereof will exceed $1,500, *shall be constructed either* (1) *by a contract let to the lowest responsible bidder, after advertising for bids, in the manner prescribed by ordinance,* except that any such contract may be entered into by the proper officers without advertising for bids, if authorized by a vote of two-thirds of all the aldermen or trustees then holding office; or (2) in the following manner, if authorized by a vote of two-thirds of all the aldermen or trustees then holding office, to-wit: the commissioner of public works or other proper officers to be designated by ordinance, shall superintend and cause to be carried out the construction of the work or other public improvement and shall employ exclusively for the performance of all manual labor

thereon, laborers and artisans whom the municipality shall pay by the day or hour; and all material of the value of $1,500 and upward used in the construction of the work or other public improvement, shall be purchased by contract let to the lowest responsible bidder in the manner to be prescribed by ordinance. However, nothing contained in this section shall apply to any contract by a city, village or incorporated town with the federal government or any agency thereof. . . ." (emphasis supplied)

B. Ill. Rev. Stat. Ch. 24 Sec. 8-1-7

"*No contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, unless an appropriation has been previously made concerning that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality, and no money belonging thereto shall be paid on account thereof.* However, pending the passage of the annual appropriation ordinance for any fiscal year, the corporate authorities may authorize heads of departments or other separate agencies of the municipality to make necessary expenditures for the support thereof upon the basis of the appropriations of the preceding fiscal year. However, if it is determined by two-thirds vote of the corporate authorities then holding office at a regularly scheduled meeting of the corporate authorities that it is expedient and in the best public interest to begin proceedings for the construction of a needed public work, then the provisions of this section shall not apply to the extent that the corporate authorities may employ or contract for professional services necessary for the planning and financing of such public work.

"This section shall not apply to municipalities operating under special charters. As amended by act approved Aug. 31, 1967. L. 1967, p. 3425." (emphasis supplied)

C. Berwyn City Code Section 2-97

"*All contracts* exceeding in amount the sum of five hundred dollars for work, materials, or supplies, relating to any of the matters under the control of the department of public works, *shall be let* by the commissioner of public works, with the approval of the city council, *to the best, most desirable, lowest, reliable and responsible bidder, after advertising for the same;* and, in case of a contract for work, in each case a bond shall be taken for the faithful performance thereof to be approved by the commissioner of public works, the city comptroller and the city attorney. This section shall not apply to contracts for work, material or supplies to be paid in whole or in part by special assessment. (Code 1939, § 16.18.)" (emphasis supplied)

D. Berwyn City Code Section 2-98

"*Whenever bids are required* under the preceding section, *the commissioner* of public works *shall advertise* in some newspaper published in the city of general circulation *for proposals for doing the work,* or furnishing such material or supplies. *A plan or profile of the work to be done, accompanied with specifications* for the doing of the same, *shall first be placed on file in the office of commissioner, before any such advertisement shall be made, which plan, profile and specification shall at all times be open for public inspection. The advertisement,* unless otherwise required by law, *shall be published at least once, not less than ten days before the day fixed for opening such proposals.* (Code 1939, § 16.19.)" (emphasis supplied)

E. Ill. Rev. Stat. Ch. 24 Sec. 8-1-8

"*All warrants drawn upon the municipal treasurer must be* signed by the mayor or president and *countersigned by the municipal clerk,* or the city comptroller if there is one, stating *the particular fund and the appropriation to which the warrant is chargeable,* and the person to whom payable. *No money shall be paid otherwise than upon such warrants so drawn,* except as otherwise provided." (emphasis supplied)

III.

FACTS WHICH PRECEDED AND PRECIPITATED THE COMMENTS OF DEFENDANT PECHOUS WHICH ARE WITHIN THE EXECUTIVE PRIVILEGE RULE

Defendant Pechous' Answers to Interrogatories (p. 2 and 3) and the Minutes of the City Council attached thereto and kept by him as City Clerk for meetings of December 29, 1975 and January 5th and 12th, 1976, establish that each of the Statutory and Ordinance requirements hereinabove set forth were brushed aside by Plaintiff Aldermen. In one night of intemperance Plaintiffs scrapped the collective judgment of the legislature and prior city councils and the law of this state and the law of the City of Berwyn. The City Attorney declared Plaintiffs' actions of December 29th illegal. The Mayor vetoed the action of the Aldermen. The record also discloses that John Van Tholen, Republican leader and political associate of the Aldermen, was hired by Clearing Disposal, the successful bidder at the December 29, 1975 meeting. It was reasonably foreseeable that Plaintiffs' drastic acts would be met by "vehement, caustic and sometimes unpleasantly sharp attacks" from stalwart men untainted by malice. Defendant Pechous, without malice, was such a stalwart man.

Moreover, Defendant Pechous as City Clerk is a part of the Executive Branch within the structure of local government. See Justice Ward's comments: *Paglini* v. *The Police Board of the City of Chicago* (1975) 335 N. E. 2d 480, 483.

Moreover, Defendant Pechous had a statutory duty to countersign warrants (checks) to pay the monthly charges arising from the questionable contract and appropriation of December 29, 1975. Therefore, the "executive privilege" line of cases such as *Blair* v. *Walker,* 64 Ill. 2d 1, 349, N. E. 2d 385 and *Loniello* v. *Fitzgerald* 42 Ill. App. 3rd 900 does apply to the Pechous comments.

IV.

APPLICATION OF THE INNOCENT CONSTRUCTION RULE COMPELS A FINDING THAT THE STATEMENTS IN THE ARTICLE ARE NOT LIBELOUS.

Under Illinois law, a court must review the article in its entirety, and if it finds a reading of the statements "stripped of innuendo" which would render the words non-defamatory, it must adopt this "innocent construction" and declare the statements non-actionable. That a libelous meaning can also be inferred makes no difference, the Court *must* choose the non-actionable reading. E. g. *Zeinfeld* v. *Hayes Freight Lines, Inc.*, 41 Ill.2d 345, 347-48 (1968); *John* v. *Tribune Company*, 24 Ill.2d 437, 441-42 (1962).

After examining the subject article as a whole one can conclude only that Pechous questioned whether plaintiffs acted in the best interests of their constituents in accepting a certain bid for the municipal garbage contract. He did not charge them with any crime. He merely expressed an opinion that plaintiffs couldn't have been acting in a straightforward manner and approve the contract.

A basis independent of the "innocent construction" rule for finding the article not actionable is that Pechous was expressing an opinion about plaintiffs' actions, not stating that they had in fact done something. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *Porcella* v. *Time, Inc.*, 300 F.2d 162 (7th Cir. 1962) (construing Illinois law).

Central to plaintiffs' complaint is the assertion that Pechous' statements charged plaintiffs with the crimes of bribery or official misconduct. (Plaintiffs' Brief, page 3). *Pechous' statements were as follows:*

> "Something smells in this contract more than garbage."
>
> "I said at the council meeting when the contract was first awarded that I think 240 pieces of silver changed hands—30 for each alderman," Pechous added. "There was just something suspicious about the way that contract was approved."

> "I've said all along that if it were ever discovered how that contract was approved there'd be some vacant chairs in the city council," charged City Clerk Pechous. "There are just too many unanswered questions in the contract. The whole thing was railroaded through, and we can't help but think there was some stronger motivation behind it."

In these statements, he was speaking figuratively. Obviously, the contract didn't in fact have an odor like garbage. One would reasonably infer, though, that he didn't think the contract was a good deal.

Similarly, the reference to "240 pieces of silver changed hands—30 for each alderman" was symbolic speech that brings to mind the Biblical story of Judas and Christ and the 30 pieces of silver. The inference is one of betrayal of a friend who had placed trust in the other—not the commission of a crime. In voting for the garbage contract, the aldermen, in Pechous' opinion, betrayed the trust of the people by voting for something not in the public interest. Plaintiffs concede that the reference to "240 pieces of silver" may not mean to a reader that Plaintiffs actually received pieces of silver. They argue, though, that a reader must conclude that Pechous charged that *something of value to which* (the aldermen were) *not entitled* had been received in return for awarding the contract. (Plaintiffs' Brief, pp. 3-4). Yet, to assert merely that the Plaintiffs got something of value does not charge them with any crime.

The statement: "The whole thing was railroaded through . . ." is not without merit:

1. The law required establishing standards and specifications available for public inspection ten days prior to advertising for bids. There were none until the night of the meeting.
2. The law required publication of a Notice to Bidders 10 days prior to bid opening. There was no publication. Instead, three bidders "just happened to be at the council meeting."

3. The law required a prior appropriation in the annual appropriation ordinance as a condition precedent to a valid contract. There was none. So plaintiffs passed an "Emergency appropriation" of $600,000.00 after the "bids" were opened. (Item 56 of December 29, 1976 Minutes.)

Defendant Pechous, recognizing that the *procedural law* is the delicate vessel that gives meaning to and implements the substantive law and good government, said: "it smells;" "it was railroaded:" "there was something suspicious:" "I think 240 pieces of silver changed hands."

These comments, when viewed in their entirety, including the symbolism, are capable of innocent construction and do not accuse anyone of a crime. If these comments of one public official against another public official are deemed actionable then we will have taken a giant step backward from the 1963 *New York Times*

> ". . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."

For the foregoing reasons, Defendant Pechous urges the Court to deny Plaintiffs' Motion for Summary Judgment and to enter summary judgment against Plaintiffs and to dismiss their Complaint against this Defendant with prejudice.

Respectfully submitted,

ROBERT C. PECHOUS

By: /s/ WILL GIERACH
Will Gierach

GIERACH, STAMBULIS & SCHUSSLER, LTD.
Attorney for Robert C. Pechous
9500 S. 50th Ct.
Oak Lawn, IL 60453
424-1600

Item 58, Min 12-09-75

Copies to Corp. Authorities Dec. 29, 1975

Mr Mayor and Members of the City Council.

I move that the City Council ~~accept the recommendation of~~ the ~~Public Works Committee of this Council, and~~ award a contract to Clearing Disposal FOR PRIVATE SCAVENGER SERVICE for a period not to exceed 6 months, effective January 1, 1976, in the amount of 3.15 @ unit per month for 15,800 units. and that such contract be awarded without the necessity of advertising for competitive bids. THE CONTRACT TO BE THE CONTRACT USED BY THE PRIVATE SCAVENGER FIRMS IN SUBMITTING THEIR BIDS.

Public Works Com.

Frank Clifford Chairman

Paul Matula — Member

Raymond B. Cox

Edward J. Kelleher

Myrtle A. Hawks

Richard F. Toman

Joseph G. Catalano

APPENDIX I 78a

APPENDIX J

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department Law Division

Joseph G. Catalano, et al.,
Plaintiffs,

vs.

Robert C. Pechous, et al.,
Defendants.

No. 76 L 11793

MOTION FOR SUMMARY JUDGMENT

Now comes ROBERT C. PECHOUS, by GIERACH, STAMBULIS & SCHUSSLER, LTD., his attorneys, and respectfully requests this Court, pursuant to Section 57(2) of the Illinois Civil Practice Act, to find that there are (no genuine issues of material fact in dispute), to enter judgment against Plaintiffs and to dismiss the action in Counts I and II of the Complaint with prejudice, upon the following grounds:

1. The Statement of Robert Pechous that "I think 240 pieces of silver changed hands—30 for each alderman" is an expression of an opinion, not the assertion of a fact, on the activities of the Plaintiff public officials by another public official and as such cannot support an action for libel. See e.g. *Porcella* v. *Time, Inc.*, 300 F.2d 162 (7th Cir. 1962) (construing Illinois law).
2. Application of the "innocent construction" doctrine precludes, as a matter of law, a finding that the Plaintiffs were libeled by any statement published by this defendant. That doctrine requires that:

> . . . the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared non-actionable as a matter of law.

John v. *Tribune Company,* 24 Ill. 2d 437, 442 (1962). The only statement *potentially libelous in the article* is the reference to "240 pieces of silver changed hands—30 for each alderman," but that statement, viewed in context, is *symbolic* speech which does not necessarily impute the taking of a bribe but more commonly implies only the betrayal of trust. The aldermen could be viewed as having generally betrayed their public trust, as Judas betrayed Christ's trust, but no reader would conclude that from the statement that 240 pieces of silver were actually received by the aldermen. If a statement can be read innocently, the law demands that it be so read. *Watson* v. *Southwest Messenger Press, Inc.* 12 Ill. App. 3rd 968, 299 N. E. 2d 409.

3. That this Court on June 9, 1977, dismissed this action on the "innocent construction" rule for Defendants Fineman and Field Enterprises, Inc.

In *support* of this motion, the *affidavit of Robert C. Pechous* is attached.

Respectfully submitted,

GIERACH, STAMBULIS & SCHUSSLER, LTD.

By /s/ WILL GIERACH
Will Gierach
One of the Attorneys for Robert C. Pechous

Of Counsel:

GIERACH, STAMBULIS & SCHUSSLER, LTD.
9500 S. 50th Ct.
Oak Lawn, IL 60453
424-1600

STATE OF ILLINOIS
COUNTY OF COOK } SS.:

AFFIDAVIT

ROBERT C. PECHOUS, having been first duly sworn on oath deposes and states:

1. Affiant is one of the defendants in the case *Catalano, et al.* v. *Pechous, et al.* now pending in the Circuit Court of Cook County as Case Number 76 L 11793.

2. Affiant was the duly elected, qualified and acting City Clerk for the four year term beginning May 1, 1973, and ending April 30, 1977, and as such officer, was obliged to keep all City records, documents and journal of council proceedings.

3. Affiant as the City Clerk was obliged to make available the public records in his keeping and exercised his *Constitutional right of free speech* to comment upon the unorthodox and precipitous actions of the aldermen concerning the summary discharge of thirty city employees in favor of a private scavenger.

4. That the electors and taxpayers had a *right to know* affiant's opinion of the conduct of the aldermen and the political ramifications thereof.

5. That affiant did not act with *malice* in making the comments he did because his own brother was one of the aldermen being criticized by affiant.

Further affiant sayeth not.

ROBERT C. PECHOUS
Robert C. Pechous

Subscribed and Sworn to before me
this day of , 1977.

Notary Public

APPENDIX K

Affidavit of Myrtle D. Slawko, Plaintiff, In support of Plaintiffs' Motion For Summary Judgment

AFFIDAVIT

Myrtle D. Slawko first being duly sworn, on oath deposes and says:

1. She and the following other duly elected and qualified persons were serving as Aldermen of the city of Berwyn, Illinois on December 29, 1975:

Joseph G. Catalano
Frank T. Clifford
Raymond G. Cox
Edward J. Kucan
Paul J. Matula
Donald Pechous
Richard F. Toman

2. In their official capacity, affiant and each of said aldermen voted on December 29, 1975 to award a certain contract for the collection of garbage within the city of Berwyn to Clearing Disposal, Inc.

3. The then City Clerk of the city of Berwyn, Illinois, Robert C. Pechous, had *no part in affiant's voting to so award said contract* and was not consulted by her regarding such vote; and, to affiant's knowledge, the said Robert C. Pechous had *no part in any of the other said aldermen's voting* to so award said contract and was not consulted by any of them regarding such alderman's vote to so award said contract.

4. *She has read the statements of Robert C. Pechous,* then City Clerk of the City of Berwyn, regarding the said aldermen's awarding of said garbage disposal contract, *as reported in an*

article (entitled, Berwyn Trash Pact Raises Stink) written by Mark Fineman in the May 12-13, 1976 edition of *Suburban Week* and published then by Field Enterprises, Inc.

5. The *statements of the said Robert C. Pechous in said article are not true* as they relate to affiant; and, to her knowledge, such statements are not true as they relate to any of the other then said Aldermen of Berwyn.

MYRTLE D. SLAWKO
Myrtle D. Slawko

Subscribed and sworn to before me
this 28th day of July, 1977.

_____

Notary Public

APPENDIX L

Excerpts From Appellee's Brief Filed
In The Appellate Court of Illinois,
First District, #77-1472

Second Division
12/19/78

No. 77-1472

Joseph G. Catalano, et al.,
Plaintiffs-Appellants,

v.

Robert C. Pechous, et al.,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County

Honorable
Daniel P. Coman,
Judge Presiding.

III. The Statements of Defendant Pechous Are Constitutionally Protected by the First Amendment

Plaintiffs Have Failed to Meet Their Burden of Proving That Defendant Pechous' Statements Were Made with Actual Malice

Defendant Pechous adopts the arguments and authority of defendants Fineman and Field set out in Point II of their brief, pp. 13-24, inclusive. The argument and authority therein stated apply with equal force to defendant Pechous.

IV. The Trial Court's Granting of Summary Judgment Must Be Sustained Since Pechous' Statement Is an Opinion and therefore Not Defamatory

Defendant Pechous adopts the arguments and authority of defendants Fineman and Field as set out in Point V of their brief, pp. 34-35, inclusive.

by the First Amendment.

V. THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT MUST BE SUSTAINED SINCE PECHOUS' STATEMENT IS AN OPINION AND THEREFORE NOT DEFAMATORY

Plaintiffs' argument focuses upon the assertion that Pechous' statements charged Plaintiffs with the crimes of bribery or official misconduct. The critical passage in this respect is

> "I think 240 pieces of silver changed hands—30 for each aldermen," Pechous added. "There was just something suspicious about the way that contract was approved."

The statement reflects the newsworthy opinion of Pechous and the expression of opinion cannot provide the basis for a libel action.[16]

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), the Supreme Court observed that

> [h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

See also Porcella v. *Time, Inc.*, 300 F.2d 162 (7th Cir. 1962) (construing Illinois law); *Buckley* v. *Littell*, 539 F.2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); Restatement (Second) of Torts § 566 (1977). Here, the allegedly libelous statements of Pechous represent an expression of opinion warranting constitutional protection. Few opinions are more fundamental to democracy than those concerning the actions of government. In its recent opinion in *Herbert* v. *Lando*, 3 Med. L. Rptr. 1241 (2d Cir. 1977), the Second Circuit noted that in its opinion in *Buckley* v. *Littell:*

> we held that statements of opinion could not afford a basis for recovery in a libel case. The reason for this circum-

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[16] In their Reply to Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment below, Plaintiffs acknowledge that Pechous' statements are expressions of "his opinion about plaintiffs' action." (R. C43).

> scription of libel was clear: the expression of personal opinions and views was fundamental to the need for vigorous debate.

3 Med. L. Rptr. at 1245.

In the instant case, Pechous' statements are non-actionable expressions of opinion. Moreover, they are the very type of opinion about the public business which must be protected under the First Amendment to assure that freedom of speech has the "breathing space" it needs "to survive." *New York Times* v. *Sullivan,* 376 U.S. at 272. Consequently, the trial court's decision must also be affirmed on this ground as there are no other statements in the article that are even potentially libelous.

APPENDIX M

No. 77-1472

Joseph G. Catalano, et al.,
Plaintiffs-Appellants,

v.

Robert C. Pechous, et al.,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County

Honorable
Daniel P. Coman,
Judge Presiding.

MEMORANDUM OF DEFENDANT PECHOUS IN RESPONSE TO PLAINTIFFS' PETITION FOR REHEARING

[EXCERPTS]

I. DEFENDANT PECHOUS AGREES THAT THE COURT'S HOLDING AS TO THE PRESS (THAT THE SUBJECT ARTICLE IS PRIVILEGED UNDER *NEW YORK TIMES* v. *SULLIVAN*, AND THAT PLAINTIFFS HAVE NOT DEFEATED THAT PRIVILEGE BY SHOWING DEFENDANTS FINEMAN AND FIELD PUBLISHED THE SUBJECT ARTICLE WITH RECKLESS DISREGARD FOR THE TRUTH) IS INCONSISTENT WITH THE COURT'S HOLDING AS TO DEFENDANT PECHOUS (THAT PECHOUS MADE HIS STATEMENT "WITH A RECKLESS DISREGARD OF WHETHER IT WAS TRUE OR FALSE:").

A. THE RECORD ESTABLISHES THAT DEFENDANTS PECHOUS AND FINEMAN AND FIELD POSSESSED VIRTUALLY THE SAME KNOWLEDGE CONCERNING THE PRIVATE SCAVENGER CONTRACT, THE IRREGULARITIES AND CIRCUMSTANCES

SURROUNDING ITS PASSAGE AND THE FAILURE TO OPEN THE SEALED BID OF S.C.A. ON JANUARY 12, 1976.

B. DEFENDANTS FINEMAN AND FIELD ALSO CLAIM RELIANCE ON DEFENDANT PECHOUS' STATEMENT. BUT DEFENDANTS FINEMAN AND FIELD INACCURATELY REPORTED THE INFORMATION IN THEIR POSSESSION: KNOWING THAT DEFENDANT PECHOUS WAS EXCUSED FROM THE DECEMBER 29, 1975 COUNCIL MEETING BEFORE THE GARBAGE BIDS WERE OPENED, THEY ATTRIBUTED WORDS CONCERNING THE GARBAGE BIDS TO PECHOUS AT THAT MEETING. FURTHER, SOME OF THE WORDS ATTRIBUTED BY FINEMAN AND FIELD TO DEFENDANT PECHOUS WERE *NEVER* SPOKEN BY DEFENDANT PECHOUS.

II. SUMMARY JUDGMENT FOR THE PLAINTIFF IS INAPPROPRIATE WHERE GENUINE AND MATERIAL FACTUAL ISSUES ARE RAISED BY THE PLEADINGS AND WHERE THE MOVING PARTY'S RIGHT THERETO IS NOT FREE FROM DOUBT.

APPENDIX N

No. 77-1472

IN THE

Appellate Court of Illinois

FIRST DISTRICT

JOSEPH G. CATALANO, et al., *Plaintiffs-Appellants,* vs. ROBERT C. PECHOUS, et al. *Defendants-Appellees.*	Appeal from the Circuit Court of Cook County Honorable **Daniel P. Coman,** Judge Presiding.

PETITION FOR REHEARING OF DEFENDANT-APPELLEE ROBERT C. PECHOUS [EXCERPTS]

E. THE APPELLATE COURT ERRED IN ANALYZING THE AFFIDAVITS OFFERED IN SUPPORT OF THE MOTIONS FOR SUMMARY JUDGMENT AND IN INCONSISTENTLY APPLYING THE BURDEN OF PROOF STANDARD RECITED IN *ST. AMANT* AND *NEW YORK TIMES*, SUPRA.

APPENDIX O

No. 51931

IN THE

Supreme Court of Illinois

ROBERT C. PECHOUS,
Petitioner,

vs.

JOSEPH G. CATALANO, et al.,
Respondents.

PETITION FOR APPEAL AS MATTER OF RIGHT, AND IN THE ALTERNATIVE, PETITION FOR LEAVE TO APPEAL

[EXCERPTS]

ARGUMENT

I

PETITIONER CLAIMS TO APPEAL AS A MATTER OF RIGHT ON THE FOLLOWING GROUNDS:

II

IN THE ALTERNATIVE, THE SUPREME COURT SHOULD EXERCISE ITS DISCRETIONARY POWERS AND GRANT PETITIONER LEAVE TO APPEAL FOR THE GROUND STATED IN I ABOVE AND FOR THESE ADDITIONAL REASONS:

1. The Appellate Court is "adjudicating in an area which lay(s) close to seditious libel, and history dictate(s) extreme caution in imposing liability."

> Cf. *Curtis Publishing Co.* v. *Butts* (1967), supra, 18 L. ed. 2d 1094, 1110.
>
> "(The Sedition Act) exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—*a power which, more than any other, ought to produce universal alarm,** because it is leveled against the right of freely examining public characters and measures. . . . " *New York Times* v. *Sullivan* (1964), supra, 11 L ed 2d 686, 703. "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government" *New York Times,* supra, at p. 703.

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* Emphasis Supplied

2. The application of the "Absolute Executive Privilege" to municipal clerks is a question of initial impression and of great concern to hundreds of clerks and the municipalities they were elected to serve throughout the State. The privilege has been applied to the Legislative Branch of Municipal Government. In *Larson* v. *Doner* (1961) 32 Ill App 2d 471, 178 NE 2d 399, the Second District applied the privilege to the city commissioner's criticism of the city clerk's performance of her duties. The First District has refused to apply the privilege to the city clerk's criticism of the city aldermen's performance of their duties, creating a conflict between the decisions of two Illinois Appellate Courts. This decision also conflicts with the decision of this Court and the U. S. Supreme Court. *Blair* v. *Walker* (1976) 64 Ill 2d 1, 349 NE 2d 385. *Barr* v. *Matteo* (1959) 360 US 564, 3 L ed 2d, 434.

3. The $2,000,000.00 addendum highlights the use of civil damage suits as a method to bridle freedom of speech in the area of the public business as condemned in *New York Times* v.

Sullivan, supra, 11 L ed 2d 686, 705: "The fear of damage awards . . . may be more inhibiting than the fear of prosecution under a criminal statute."

4. The evidence in the record is "constitutionally insufficient" to support a judgment for plaintiffs.

5. Respectfully, the Appellate Court has unjustly applied non-jurisdictional waiver principles in the face of the truth. The situation closely parallels the belated realization of the importance of factual questions raised by the pleadings in *Ashland Savings & Loan Ass'n* v *Aetna Insurance Co.* (1st Dist., 1974) 18 Ill App 3d 70, 309 NE 2d 293, 300.

6. The Appellate Court's application of the "Innocent Construction Rule" conflicts with the decisions of this Court and other Illinois Appellate Courts which reviewed similar factual situations and innocently interpreted the words.

7. The judgment of the Appellate Court is final and not interlocutory.

III

THE OPINION OF THE APPELLATE COURT SHOULD BE REVERSED FOR FOUR BASIC REASONS:

A. PLAINTIFFS HAVE FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT PETITIONER'S STATEMENTS WERE MADE WITH ACTUAL MALICE AS DEFINED AND CONSTRUED IN *NEW YORK TIMES* V. *SULLIVAN* AND ITS PROGENY.

B. THE RECORD IS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT A JUDGMENT.

APPENDIX P

No. 51931

IN THE

Supreme Court of Illinois

ROBERT C. PECHOUS,
Defendant-Appellant,

v.

JOSEPH G. CATALANO, et al.,
Plaintiffs-Appellees

APPELLANT'S SUPPLEMENTAL BRIEF

[EXCERPTS]

The genuine issues of material fact still in dispute are:

1. Was there actual malice?

2. Was the statement made on December 29, 1975 or on January 12, 1976?

3. Was the statement "240 pieces of silver changed hands—30 to each alderman" or "240 pieces of silver cemented the relationship between Clearing and the aldermen"?

4. Was PECHOUS, in addition to being a City Clerk, acting as a legislative representative of the Town Board of Health?

The Record discloses that these facts are disputed.

1. The Pleadings: Defendant-Appellant in his pro se answer denied the date of the statement, the content of the statement, and whether any statement was made with actual malice. (R. C9 & C 10),

2. Motions for Summary Judgment and Supporting Affidavits:

A. Plaintiffs-Appellees' sole affidavit does not claim actual malice, nor assert the date of the statement nor the contents of the statement (R. C 341),

B. The Appellate Court erred in attempting to provide those facts by reference to the affidavit and answers to interrogatories of Defendant-Appellee FINEMAN (newspaper reporter) when such was never offered against Defendant-Appellant PECHOUS (Supplemental Opinion, p. 3),

C. Plaintiffs-Appellees' motion for summary judgment and sole affidavit never complain of Defendant-Appellant PECHOUS' actual statement. Rather they complain of the statement "*as published*" in the *Suburban Week* and "*as reported*" in the *Suburban Week* (R. c 336, C 341).

Plaintiffs-Appellees have simply failed to demonstrate that any statement of Defendant-Appellant PECHOUS was made with actual malice. The burden of proving actual malice is Plaintiffs'—(*New York Times,* supra).

APPENDIX Q

No. 51931

IN THE

Supreme Court of Illinois

ROBERT C. PECHOUS,
Defendant-Appellant,

v.

JOSEPH G. CATALANO, et al
Plaintiffs-Appellees

APPELLANT'S REPLY BRIEF

ARGUMENT

I

PLAINTIFFS-APPELLEES HAVE FAILED TO PROVE THAT THE STATEMENTS OF APPELLANT PECHOUS WERE MADE WITH ACTUAL MALICE.

A.

APPELLANT PECHOUS CONDUCTED AN INVESTIGATION INTO THE PUBLIC RECORDS PRIOR TO MAKING HIS STATEMENTS.

B.

PLAINTIFFS-APPELLEES HAVE FAILED TO REBUT THE "HOT NEWS" DOCTRINE AS APPLIED TO APPELLANT PECHOUS' CITY COUNCIL MEETING COMMENTS.

C.

APPELLANT PECHOUS' STATEMENTS TO REPORTER FINEMAN WERE LESS CAUSTIC THAN HIS INITIAL CRITICISMS.

III.

THE RULE OF INNOCENT CONSTRUCTION REQUIRES THAT APPELLANT PECHOUS' COMMENTS BE HELD NON-ACTIONABLE

APPENDIX R

No. 51931

IN THE

Supreme Court of Illinois

ROBERT C. PECHOUS,
Defendant-Appellant,

v.

JOSEPH G. CATALANO, et al
Plaintiffs-Appellees

DEFENDANT-APPELLANT'S REVISED PETITION FOR REHEARING

[EXCERPTS]

II

THE COURT ERRONEOUSLY GRANTS SUMMARY JUDGMENT FOR THE PLAINTIFFS BASED ON *INFERENCES* DRAWN WITHOUT TRIAL, WITHOUT THE OPPORTUNITY TO SEE OR WEIGH THE *CREDIBILITY* OF WITNESSES, BY *ASSUMING* FACTS NOT IN EVIDENCE, AND BY USING AN AFFIDAVIT NOT OFFERED AGAINST PECHOUS

III

THE OPINION APPLIES THE ACTUAL MALICE STANDARD DIFFERENTLY AS BETWEEN FREEDOM OF

THE PRESS AND FREEDOM OF SPEECH. THE OPINION IS INTERNALLY INCONSISTENT AND APPLIES THE LAW OF ADMISSIONS BY ANSWER TO INTERROGATORIES IN A DISCRIMINATORY FASHION

IV

THE COURT ERRED BY GRANTING SUMMARY JUDGMENT AGAINST PECHOUS WHEN THE CASE WAS NOT RIPE FOR DECISION